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THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE AND THE POLITICAL PROCESS

*William Michael Treanor**

The original understanding of the Takings Clause of the Fifth Amendment¹ was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used. In 1922, however, the Supreme Court's decision in *Pennsylvania Coal v. Mahon*² established a new takings regime. In an opinion by Justice Holmes, the Court held that compensation must be provided when government regulation "goes too far"³ in diminishing the value of private property. Since that decision, the Supreme Court has been unable to define clearly what kind of regulations run afoul of Holmes's vague standard. Attempts to do so, including the Court's recent decisions in *Lucas v. South Carolina Coastal Council*⁴ and *Dolan v. City of Tigard*,⁵ have created a body of law that more than one recent commentator has described as a "mess."⁶

The Court and leading commentators have not seriously considered the possibility that there was an underlying rationale, worth reviving, that explains why the Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value. This Article contends that the limited scope of the takings clauses reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure. The Article then argues on both

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1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

2. 260 U.S. 393 (1922).

3. *Id.* at 415.

4. 112 S. Ct. 2886 (1992).

5. 114 S. Ct. 2309 (1994).

6. Daniel A. Farber, Public Choice and Just Compensation, 9 Const. Commentary 279, 279 (1992); Saul Levmore, Just Compensation and Just Politics, 22 Conn. L. Rev. 285, 287 (1990).

originalist and non-originalist grounds for a process-based theory of the Takings Clause that departs dramatically from current takings jurisprudence.

Part I of this Article traces the history of the just compensation principle through *Pennsylvania Coal*. It begins by looking at compensation practices prior to the enactment of the Takings Clause and shows that initially there was no rule requiring compensation when the government physically took property or regulated it. The decision whether or not to provide compensation was left entirely to the political process. The emergence of the compensation principle represented a break with that tradition, but only a partial one. While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations.

Part II discusses modern misunderstanding (or disregard) of the original understanding. It begins by looking at *Pennsylvania Coal* and then turns to the way in which original understanding of the clause figures—or, for the most part, does not figure—in current controversies. Focusing on the recent decisions in *Dolan* and *Lucas*, it discusses the Supreme Court's limited concern with the original understanding. This Part then surveys academic writing on takings, which typically interprets the initially narrow reach of the Takings Clause as a reflection of an outdated conception of property. Even Professor Joseph Sax's article "Takings and the Police Power"⁷ and Professor Richard Epstein's book *Takings*,⁸ works in part grounded in appeals to original intent, minimize the significance of the early limits on the compensation requirement. Their theories reflect instead broad applications of what each considers the animating concept behind the Takings Clause: a bar on arbitrary government action (for Sax); Lockean-liberalism (for Epstein).

Part III provides the historical background for an alternative reading of the Takings Clause by analyzing why constitutional protection for property rights was initially so limited. The framers did not desire substantive protection of all property interests because, contrary to much legal scholarship, liberalism was not the dominant world view at the time of the framing. Rather, republicanism continued to exert substantial influence on political discourse. Many of the framers believed that government could—and in the interests of society often should—limit individuals' free use of their property; balancing societal needs against individual property rights was left in large part to the political process. After examining the ideological background of the framing in order to show why the framers did not favor absolute protection of property rights, this Part then examines the history of the first takings clauses and the political

7. Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964).

8. Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).

philosophy of James Madison, who initially proposed the Fifth Amendment's Takings Clause, to determine why the right against physical seizure received special protection. It argues that these interests were protected because of the framers' concern with failures in the political process. At the same time, Madison desired that the clause have a broader educative function, embodying a national commitment against arbitrary interference with property interests.

Updating original intent, Part IV develops a modern political process theory of the Takings Clause. Under this theory, courts should mandate compensation only in those classes of cases in which process failure is particularly likely today—when there has been singling out or in environmental racism cases, where there has been discrimination against discrete and insular minorities. Outside of this realm, the Takings Clause should serve an educative function, but should not lead to court enforcement. Except where process failure is likely, the decision about whether to compensate should be left to the political process, even in cases involving government seizure of property. The political process is certainly capable of handling that responsibility. A string of current legislation and legislative proposals, including the Contract with America, provide for compensation in situations in which courts would not order it.⁹

This Part defends this political process approach on originalist grounds. The analytic approach used is derived from Professor Lawrence Lessig's recent elaboration of a translation model¹⁰ that was implicit in earlier constitutional scholarship.¹¹ According to that model, the most faithful application of original intent interprets the constitutional text in a way that, rather than mechanically following the initial construction, is sensitive to changed circumstances. This Part also provides non-originalist justifications for a political process approach to the Takings Clause. The political process approach is consistent with constitutional structure in a way that current takings law is not, and, unlike current caselaw, it is consistent with a sensible reading of the language of the Takings Clause. In addition, because it reflects the presumption that majoritarian decisionmakers should resolve property questions whenever their judgment is not suspect, this process-based approach accords appropriate deference to majoritarian decisionmaking. Recent scholarship regarding political and civil rights has argued that activist courts can skew the political process in a way that, ironically, hampers the causes that the courts sought to help. This Article suggests that the same critique is equally applicable in the context of economic rights. Finally, while a process-based approach would depart from current caselaw, it would also return to an older tradition of judicial deference.

9. See *infra* notes 436–440 and accompanying text.

10. See Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993).

11. See *id.* at 1171 n.31 (discussing precedents for his approach).

I. TAKINGS LAW THROUGH *PENNSYLVANIA COAL*

This Part looks at early takings law with the help of different historical guides to the interpretation of constitutional text: background practices, framers' intent, and early judicial interpretations. In colonial America, government routinely acted in ways that affected private property, and the political process determined when compensation was due. No judicially enforceable compensation requirement existed during this period. Even after the establishment of a compensation requirement, it applied only to interference with physical ownership, and government routinely acted in ways that diminished the value of private property without providing compensation.

A. *Takings Law Before the Fifth Amendment*

Precedents for the Fifth Amendment's Takings Clause were relatively few in number and narrow in application. Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment. Moreover, no colonial charter or state constitution recognized that regulations could give rise to a requirement of compensation. Majoritarian decisionmakers did not always provide compensation, and courts did not mandate compensation when they failed to do so.

Only two fundamental documents of the colonial era provided even limited recognition of a right to compensation. A provision of the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement, but it was limited to the seizure of personal property:

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced.¹²

The 1669 Fundamental Constitutions of Carolina, drafted by John Locke and never fully implemented, provided compensation for the seizure of real property.¹³ They authorized the High Steward's Court to erect build-

12. Massachusetts Body of Liberties § 8 (1641), reprinted in *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) [hereinafter *Sources of Our Liberties*]. This provision of the Body of Liberties appears to have been modelled on Article 28 of Magna Carta, which barred crown officials from "tak[ing] anyone's grain or other chattels, without immediately paying for them in money." Magna Carta art. 28 (1215), reprinted in *Sources of Our Liberties*, supra, at 11, 16; see also Fred Bosselman et al., *The Takings Issue: A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners* 93 & n.45 (1973) (suggesting this linkage).

13. See *Colonial Charters: Introduction*, in *3 Foundations of Colonial America 1677* (W. Keith Kavenagh ed., 1973); see also Wesley F. Craven, *The Colonies in Transition*,

ings and lay highways, adding: "The damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint."¹⁴

None of the other colonial charters recognized a compensation requirement, either for personal or real property.¹⁵ Where they protected personal or real property, the colonial charters did so by imposing a requirement of procedural regularity, rather than by recognizing a substantive right. For example, in a typical provision, the 1683 New York Charter of Liberties and Privileges provided that "Noe freeman shall . . . be dis-seized of his ffreehold . . . But by the Lawfull Judgment of his peers and

1660-1713, at 99-101 (1968) ("The proprietors . . . advised the colonists to look upon the Constitutions as a guide to the ultimate goal, rather than as an objective that could be immediately achieved.").

14. Fundamental Constitutions of Carolina art. 44 (1669), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 108, 115 (1971). Perhaps because the attempts to put the Fundamental Constitutions of Carolina into operation were unsuccessful, see *supra* note 13 and accompanying text, leading accounts have considered the Massachusetts Body of Liberties, with its protection of personal property, the only colonial precursor of the Takings Clause. See Bosselman et al., *supra* note 12, at 92-94; 1 Schwartz, *supra*, at 319.

15. Although compensation requirements were not adopted in the colonies, they did have a great champion in the English legal world. William Blackstone argued in his *Commentaries* that compensation was due when real property was taken, although he did not provide a citation to support this assertion. He stated that, regardless of how beneficial the construction of a new road was, it could be built over private land without the owner's consent only if the legislature directed its confiscation, adding: "But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries* *139.

However, Blackstone's statement about compensation must be viewed in the larger context of parliamentary sovereignty, a doctrine of which he was the most prominent defender. See, e.g., *id.* at *147 (asserting that "the supreme and absolute authority of the state . . . is vested by our constitution" in Parliament). As Professor Arthur Lenhoff has written, "The English Parliament, by virtue of its omnipotence and its freedom from any legal control, may wield any power of taking. Accordingly, the omission of a provision directing the payment of full compensation in a legislative act concerning expropriation has been construed as authorization to take without compensation." Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 *Colum. L. Rev.* 596, 598 n.15 (1942). Thus, in *Governor & Company of the British Cast Plate Mfrs. Co. v. Meredith*, 100 Eng. Rep. 1306 (K.B. 1792), citation to Blackstone did not convince the court to award compensation for consequential damages in a road-building case: "If the Legislature think it necessary, as they do in many cases, they enable the [road] commissioners to award satisfaction to the individuals who happen to suffer; but if there be no such power, the parties are without remedy, provided the commissioners do not exceed their jurisdiction . . ." *Id.* at 1307 (Kenyon, C.J.). Justice Buller added, "There are many cases in which individuals sustain an injury, for which the law gives no action . . ." *Id.*; see also *Boulton v. Crowther*, 107 Eng. Rep. 544 (K.B. 1824) (rejecting claim against trustees of roads for damages to private property caused by public road construction authorized by Act of Parliament).

by the Law of this province.”¹⁶ Such provisions can be traced back to Article 39 of Magna Carta, which provided that “No free man shall be . . . dispossessed . . . except by the legal judgement of his peers or by the law of the land.”¹⁷

These provisions assigned to a majoritarian decisionmaking body—either a jury or the state legislature—the responsibility for determining when to take property and when to compensate. In practice, compensation was the norm when the state took private property. For example, in the case of road-building, the most common occasion in colonial America for the exercise of the eminent domain power,¹⁸ the authorizing statutes typically provided for juries to award compensation for the land taken.¹⁹ At the same time, however, colonial governments often took private property without providing compensation. In particular, all colonies except Massachusetts provided that undeveloped land could be taken for roads without compensation.²⁰ Virginia apparently did not provide compensation even for developed land²¹ (although it did provide compensation when the colony executed slaves who had participated in rebellions or had been found guilty of crimes).²² Moreover, uncompensated takings occurred outside the context of physical takings of land. For example, a parliamentary statute aimed at obtaining masts for the navy assigned the crown rights to white pines growing on undeveloped land in the colo-

16. New York Charter of Libertyes and Priviledges (1683), reprinted in 1 Schwartz, *supra* note 14, at 163, 165. For other examples of provisions imposing a requirement of procedural regularity, see Pennsylvania Frame of Government (1682), reprinted in 1 Schwartz, *supra* note 14, at 132, 140 (freeman cannot be dispossessed of freehold without due process of law); Concessions and Agreements of West New Jersey ch. XVII (1677), reprinted in 1 Schwartz, *supra* note 14, at 126, 127 (individual cannot be deprived of real or personal property “without a due tryal, and judgment passed by twelve good and lawful men of his neighbourhood”); Maryland Act for the Libertyes of the People (1639), reprinted in 1 Schwartz, *supra* note 14, at 68, 68 (Christian inhabitants of Maryland, other than slaves, shall not be “disseised or dispossessed of their freehold goods or Chattels . . . [except] according to the Laws of this province”); see also *The Rights of the Colonists and a List of Infringements and Violations of Rights* art. 3 (1772), reprinted in 1 Schwartz, *supra* note 14, at 200, 203 (“The supreme power cannot Justly take from any man, any part of his property without his consent, in person or by his Representative.”).

17. Magna Carta art. 39, reprinted in *Sources of Our Liberties*, *supra* note 12, at 17.

18. See Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 22 (1985).

19. For examples of colonial statutes authorizing condemnation of land and building materials for roads, see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 579–83 & nn.88–94 (1972); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 695 n.6 (1985).

20. See Treanor, *supra* note 19, at 695.

21. See *id.* at 695 n.6 (citing Virginia statutes).

22. See Morton J. Horwitz, *Transformation of American Law: 1780–1860*, at 63–64 (1977). Virginia also provided compensation when privately owned land was taken for a port. See *Act to Enlarge the Power of the Corporations of the City of Williamsburgh and Borough of Norfolk and for Other Purposes Therein Mentioned* (1757), reprinted in 3 *Foundations of Colonial America*, *supra* note 13, at 2363, 2364.

nies,²³ and Virginia statutes aimed at protecting the state's reputation as a producer of quality tobacco empowered the state to seize without compensation processed tobacco of less than premium quality.²⁴ In addition, land could be taken with compensation that was less than full value, or, indeed, that was anything more than nominal. Thus, in Connecticut, Massachusetts, and Rhode Island, highways for the postal service between New York and Boston were built over what had been privately owned roads; the new roads were narrower than the old privately owned roads, and the only "compensation" the owners received was the land produced by the narrowing.²⁵ As historian Forrest McDonald has observed of this practice, "New England colonial governments compensated landowners for taking part of their land by letting them keep the remainder of their land."²⁶ Similarly, in Maryland, land for ironworks was condemned, and the former owners received only its value as uncultivated land, not its value as a mill site. Legal scholar John Hart has characterized the statute authorizing this minimal compensation as "consciously confiscatory."²⁷ There appears to be no case in which a court directed compensation from the government where a statute did not provide for it or in which a court increased the amount of compensation already provided by another governmental body.²⁸

Although colonies clearly limited the ways in which individuals could use property, no colonial charter mandated compensation when regula-

23. See 2 Geo. II, ch. 35, §§ 1-2 (1729); 8 Geo. I, ch. 12, §§ 1-2 (1721); 9 Anne, ch. 22, §§ 1-2 (1710).

24. See 1 David J. Mays, Edmund Pendleton 1721-1803: A Biography 112-13 (1952).

25. McDonald, *supra* note 18, at 23.

26. *Id.*

27. John Hart, Confiscatory Condemnation and the Founders' Conception of Eminent Domain: The Maryland Ironworks Act 1 (Oct. 22, 1993) (unpublished manuscript, on file with author).

28. For more detailed analyses of early compensation practices and takings law, see Bosselman et al., *supra* note 12, at 82-104; Horwitz, *supra* note 22, at 63-66; McDonald, *supra* note 18, at 22-24; James W. Ely, Jr., "That due satisfaction may be made:" The Fifth Amendment and the Origins of the Compensation Principle, 36 Am. J. Legal Hist. 1 (1992); Stoebe, *supra* note 14, at 572-88; Treanor, *supra* note 19, at 695-98 & nn.5-6.

Based on my research in early records, I have previously argued that, while compensation was often given in the years before the Fifth Amendment, there were also numerous cases in which it was not given; the most frequent instances of uncompensated takings involved unimproved land taken for roads. See Treanor, *supra* note 19, at 695. Professors Horwitz and McDonald have reached similar conclusions. See Horwitz, *supra* note 22, at 63-65; McDonald, *supra* note 18, at 22-24. Professor Ely has recently criticized what he labelled the "Horwitz/Treanor" thesis, stating, "Contrary to the opinion of Horwitz and Treanor, the common law principle of compensated takings was well established long before the framing of the Fifth Amendment. Indeed, the *usual* practice was to compensate owners for the appropriation of their property." Ely, *supra*, at 15 (emphasis added). This criticism misses my point: Compensation was the *usual* practice; the fact that it was the norm, rather than the inviolable rule, demonstrates that the principle that the state *necessarily* owed compensation when it took physical property had not been established. The absence of judicial decisions requiring compensation was not a colonial aberration. English courts did not require compensation. See *supra* note 15.

tions affected the value of property. Furthermore, courts did not direct compensation for such regulations. Land use was subject to extensive regulations.²⁹ In colonial Virginia, for example, various statutes barred overplanting of tobacco and required the growing of crops other than tobacco.³⁰ Boston had zoning regulations governing the location of bakeries, slaughterhouses, stills, and tallowchandlers, and violators were subject to prosecution.³¹ New York City and Charlestown enacted ordinances barring further operation of slaughterhouses within city limits.³²

Colonial governments regulated not only land use, but also business operations and economic decisionmaking. For example, fee schedules for ferries were imposed,³³ peddlers had to obtain licenses and pay duties,³⁴ and pork, beef, flour, tar, pitch, and turpentine were subject to inspection for compliance with statutory standards prior to sale or export.³⁵ Taverns were licensed, based on need and a determination of whether the tavern would impair public morals, and licensing fees were charged.³⁶ Bread prices were regulated.³⁷ Various colonies experimented with sumptuary legislation, restricting expenditures on clothing and jewelry.³⁸ Laws barred speculation in commodities, including such practices as forestalling (purchase of goods while in transit to the market), engrossing (purchase of large quantities of commodities for resale), and regrating (purchase of goods in a market for resale in the same market).³⁹

The first state constitutions of the revolutionary era followed colonial precedent. None of the state constitutions adopted in 1776 had just compensation requirements. The three that contained eminent domain clauses simply echoed Article 39 of Magna Carta, providing that the consent of the owner or of the legislature was needed for the state to exercise its eminent domain power.⁴⁰

29. See Bosselman et al., *supra* note 12, at 84.

30. See *id.* at 82–83; see also 1 Mays, *supra* note 24, at 60, 113 (noting planter requests for laws limiting tobacco production).

31. See Carl Bridenbaugh, *Cities in the Wilderness: The First Century of Urban Life in America 1625–1742*, at 238 (1964); William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830*, at 52, 200 n.56 (1975).

32. See Bridenbaugh, *supra* note 31, at 239.

33. See Nelson, *supra* note 31, at 52, 200 (Massachusetts).

34. See Michael Kammen, *Colonial New York: A History* 189 (1975).

35. See 1 Mays, *supra* note 24, at 56 (Virginia).

36. See Bridenbaugh, *supra* note 31, at 266–73 (New York, Rhode Island, Pennsylvania, South Carolina, Massachusetts); Nelson, *supra* note 31, at 52 (Massachusetts).

37. See McDonald, *supra* note 18, at 14.

38. See *id.* at 15–17 & n.9.

39. See *id.* at 14 & n.8.

40. See Md. Const. of 1776, art. XXI, reprinted in 3 *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 1686, 1688* (Francis N. Thorpe ed., 1909) [hereinafter *The Federal and State Constitutions*]; N.Y. Const. of 1777,

The Revolution increased governmental actions that challenged or destroyed property rights. The revolutionary army seized private goods without compensation.⁴¹ States passed statutes limiting wages and prices and barring forestalling and engrossing.⁴² A variety of statutes undercut the property interests of British citizens and American loyalists. Some states passed laws that allowed Americans to escape most of the debts owed to the English. For example, in 1777 Virginia passed a Sequestration Act that allowed Virginia debtors to pay money owed English subjects into the state treasury and provided that payments in paper money would be treated at face value. As paper money depreciated to a value of sixty to one, Virginians were able to pay off their English debts at a small fraction of their cost.⁴³ Even more dramatically, divestment acts and bills of attainder effected the confiscation of loyalist property worth, by one historian's estimates, twenty million dollars at a time when the value of all improved real estate in the country was two hundred million dollars.⁴⁴ Equally significant, revolutionary era governmental actions also had the effect of redistributing wealth among Americans. In order to avoid concentrations of property ownership, many of the states adopted legislation that explicitly required the sale of seized loyalist property only in small tracts.⁴⁵ State legislators aided debtors, and thus deprived creditors of property rights, by passing statutes that stayed execution of debts, that made valueless land legal tender, and that permitted payment of debts in depreciated paper money.⁴⁶

The first state constitution to contain a compensation requirement was the Vermont Constitution of 1777, which declared that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."⁴⁷ The Massachusetts Constitution of 1780 provided that "whenever the public exigencies re-

art. III, reprinted in 5 *The Federal and State Constitutions*, supra, at 2623, 2632; N.C. Const. of 1776, art. XII, reprinted in 5 *The Federal and State Constitutions*, supra, at 2787, 2788.

41. See *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during revolutionary war); 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-06 (St. George Tucker ed., 1803) [hereinafter Tucker].

42. See McDonald, supra note 18, at 15 n.8.

43. See id. at 151.

44. See id. at 91-92 & n.71.

45. See id. at 90-93; Claude H. Van Tyne, *The Loyalists in the American Revolution* 335-41 (1929); Gia L. Cincone, Note, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 *Stan. L. Rev.* 1229, 1236 (1987).

46. See James W. Ely, Jr., *The Guardian of Every Other Right* 37-38 (1992); McDonald, supra note 18, at 156-57; Richard B. Morris, *The Forging of the Union: 1781-1789*, at 154-59 (1987).

47. Vt. Const. of 1777, ch. I, art. II, reprinted in 6 *The Federal and State Constitutions*, supra note 40, at 3737, 3740. In 1787, Vermont ratified a new constitution that had essentially the same compensation language. See Vt. Const. of 1786, ch. I, art. II, reprinted in 6 *The Federal and State Constitutions*, supra note 40, at 3749, 3752.

quire that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”⁴⁸ The final revolutionary era document to contain a compensation requirement was the Northwest Ordinance of 1787, which the Continental Congress passed as the governance instrument for the Northwest Territories. It stated: “[S]hould the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”⁴⁹ In each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way.⁵⁰

B. *The Fifth Amendment’s Takings Clause*

Despite this precedent for a constitutional compensation requirement, states did not demand a similar limitation on the federal government in the Bill of Rights. State ratifying conventions sought as amendments to the Constitution every provision in the Bill of Rights except the Takings Clause.⁵¹ There are apparently no records of discussion about the meaning of the clause in either Congress or, after its proposal, in the states. Madison’s statements thus provide unusually significant evidence about what the clause was originally understood to mean (and about why Madison thought this particular protection of property necessary). As will be discussed, those statements uniformly indicate that the clause only mandated compensation when the government physically took property.⁵² Similarly, St. George Tucker, the first legal scholar to offer an interpretation of the clause, took the position that it was concerned with physical seizures. In his 1803 treatise, he wrote that the clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining

48. Mass. Const. of 1780, part I, art. X, reprinted in 3 *The Federal and State Constitutions*, supra note 40, at 1888, 1891.

49. Northwest Ordinance of 1787, art. 2, reprinted in *Sources of Our Liberties*, supra note 12, at 392, 395. On the status of the ordinance as constitution, see Denis P. Duffey, Note, *The Northwest Ordinance as a Constitutional Document*, 95 *Colum. L. Rev.* 929 (1995).

50. For constructions of the Massachusetts Constitution, see, e.g., *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846) (no compensation when statute barred owner from removing sand and gravel from beach); *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823) (no compensation for consequential damages); *Perry v. Wilson*, 7 Mass. 393 (1811) (compensation required for logs taken for canal construction); *Gedney v. Tewksbury*, 3 Mass. 306, 309 (1807) (Parsons, C.J.) (statutory provision of compensation for land taken for public road to be built “[i]n pursuance of” Takings Clause of Massachusetts Constitution). For a construction of the Northwest Ordinance, see *Renthorp v. Bourg*, 4 Mart. 97, 132–33 (La. 1816) (Northwest Ordinance only required compensation when an individual’s property or services were taken to aid war effort). There are no early Vermont cases construing the takings clause of its constitution.

51. See Edward Dumbauld, *The Bill of Rights and What It Means Today* 161–63 (1957) (listing amendments proposed by states).

52. See *infra* Part III.C.

supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."⁵³

C. *Early Interpretations of the Takings Clause and Its State Counterparts*

Most of the early caselaw came from state courts. These courts held that compensation was required if government physically took property, but not if it merely regulated the owner's use of property. When the Supreme Court eventually began to resolve takings issues under the federal Constitution, its holdings accorded with these earlier state decisions.

1. *State Courts.* — In antebellum America, state courts usually required compensation only when the government physically took property or, at most, when governmental actions involved the physical invasion of property.⁵⁴ Thus, the majority view was that consequential damages—those from activities that did not involve physical invasions or appropriations of property for a public use, but that nonetheless had physical consequences, such as subsidence occasioned by a road-building project—were not compensable takings.⁵⁵ Indeed, treatise writer Theodore Sedgwick observed in 1857 with respect to the Takings Clause: "It seems to be settled that, to entitle the owner to protection under this clause, the property must be actually taken in the physical sense of the word"⁵⁶

More significant, in states in which there was a takings clause or in which a takings requirement was judicially imposed in the absence of such a constitutional provision, antebellum courts nonetheless consistently held that state regulation pursuant to the police power did not give

53. 1 Tucker, *supra* note 41, at 305–06.

54. It should be added that ratification of the Fifth Amendment did not immediately lead all the states to abandon uncompensated physical takings. See Horwitz, *supra* note 22, at 64–65 (discussing Pennsylvania and South Carolina case law).

55. See *id.* at 71–74; Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. Econ. Hist. 232, 236 (1973).

56. Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 519–20 (1857). Sedgwick's statement does not fully capture all antebellum case law. For example, judges repeatedly concluded that the revocation of a franchise gave rise to a compensable taking on the theory that the revocation was a seizure of intangible property. See, e.g., *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 533–34 (1848); *id.* at 543 (Woodbury, J., concurring); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 571 (1837) (McLean, J., concurring); *id.* at 638 (Story, J., dissenting); *Enfield Toll Bridge Co. v. Hartford & New Haven R.R.*, 17 Conn. 40, 59–61 (1845); *Boston Water Power Co. v. Boston & Worcester R.R.*, 40 Mass. (23 Pick.) 360, 393 (1839); *Backus v. Lebanon*, 11 N.H. 19, 24 (1840); *Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66–67 (1834); 2 James Kent, *Commentaries on American Law* 400 n.a (8th ed. 1854). Nor did the proposition that consequential damages were not compensable command universal assent. See *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 161, 167–68 (N.Y. Ch. 1816) (Kent, C.) (compensating for consequential damages); *Charles River Bridge*, 36 U.S. (11 Pet.) at 638 (attacking decisions holding consequential damages not compensable) (Story, J., dissenting); 2 Kent, *supra*, at 400 n.a (same). Nonetheless, the dominant early approach was "no taking without a touching." Stoebuck, *supra* note 19, at 601.

rise to a compensation requirement, regardless of how dramatically that regulation affected the value of property.⁵⁷ These decisions sanctioned what one historian has called "a deluge of state and local legislation *regulating* economic and social life."⁵⁸ Even Chancellor Kent believed regulation of nuisances, without the provision of compensation, appropriate. In his treatise, he stated: "The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens."⁵⁹ In early cases, courts approved regulations addressing common law nuisances, such as the location of cemeteries,⁶⁰ the discharge of sewage,⁶¹ fire hazards,⁶² the storage of gunpowder,⁶³ and the operation of a bowling alley.⁶⁴ Chief Justice Lemuel Shaw was a pioneer in a broader conception of the police power that gave the legislature the power to regulate activities that were not traditional nuisances,⁶⁵ and, under his

57. See Bosselman et al., *supra* note 12, at 106–10; Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. Cal. L. Rev. 1, 76 (1986); Scott M. Reznick, Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. Chi. L. Rev. 854, 862 (1973).

58. William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 Hastings L.J. 1061, 1076 (1994). In support of his claim that in late eighteenth and early nineteenth century America public regulatory power was "omnipresent," *id.*, Novak offers a dizzying list of state and municipal regulations. See *id.* at 1077–80. For example, he notes that between 1781 and 1801 the New York legislature

passed special laws regulating lotteries; hawkers and peddlers; the firing of guns; usury; frauds; the buying and selling of offices; beggars and disorderly persons; rents and leases; firing woods; the destruction of deer; stray cattle and sheep; mines; ferries; apprentices and servants; bastards; idiots and lunatics; counsellors, attorneys and solicitors; travel, labor, or play on Sunday; cursing and swearing; drunkenness; the exportation of flaxseed; gaming; the inspection of lumber; dogs; the culling of staves and heading; debtors and creditors; the quarantining of ships; sales by public auction; stock jobbing; fisheries; the inspection of flour and meal; the practice of physic and surgery; the packing and inspection of beef and pork; sole leather; strong liquors, inns, and taverns; pot and pearl ashes; poor relief; highways; and quit rents.

Id. at 1076; see also William J. Novak, *Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America*, 18 L. & Soc. Inquiry 1, 18–31 (1993) (arguing that regulations were pervasive in antebellum America).

59. 2 Kent, *supra* note 56, at 405.

60. See *Brick Presbyterian Church v. Mayor of New York*, 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826); see also *Stuyvesant v. Mayor of New York*, 7 Cow. 588 (N.Y. Sup. Ct. 1827) (same); *Coates v. Mayor of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827) (upholding principle, but finding regulation invalid because of failure to comply with requirements of authorizing state statute).

61. See *Baker v. Boston*, 29 Mass. (12 Pick.) 183 (1831).

62. See *Republica v. Duquet*, 2 Yeates 493 (Pa. 1799); Reznick, *supra* note 57, at 862–63.

63. See *Mayor of New York v. Ordrenan*, 12 Johns. 122 (N.Y. Sup. Ct. 1815).

64. See *Tanner v. Trustees of Albion*, 5 Hill 121 (N.Y. Sup. Ct. 1843).

65. See Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 252–54 & n.91 (1957).

leadership, the Massachusetts Supreme Judicial Court upheld a statute designed to prevent erosion by barring the removal of gravel and sand from certain beaches,⁶⁶ and another that banned the construction of wharfs beyond a certain point in Boston Harbor.⁶⁷ Thus, the scope of permissible police regulation was not fixed. As long as majoritarian decisionmakers operated within an area in which they were permitted to regulate, no compensation was due. As one pre-*Pennsylvania Coal* treatise explained the relationship between the police power and compensation:

Under the police power, rights of property are impaired not because they may become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.⁶⁸

2. *Supreme Court Jurisprudence.* — Supreme Court decisions prior to 1870 interpreting the Takings Clause are few in number.⁶⁹ One of the

66. See *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846).

67. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

68. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 546-47 (1904).

69. See Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 *Persp. in Am. Hist.* 329, 376 (1971) (commenting on small number of early Supreme Court cases). The dearth of early Supreme Court takings law reflects several factors. First, the Court held that the Takings Clause only applied to takings by the federal government. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). Second, until after the Civil War, the federal government relied on the states to condemn the property that would be used by the federal government. See *Kohl v. United States*, 91 U.S. 367, 373 (1875); *Stoebuck*, *supra* note 19, at 559 n.18. Third, until the passage of the Tucker Act, ch. 359, § 1, 24 Stat. 505 (1887), Congress retained sole responsibility for paying takings claims against the federal government; at that time, it gave the Court of Claims jurisdiction over such cases. See *Langford v. United States*, 101 U.S. 341, 343 (1880) ("It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation."); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative toward a Judicial Model of Payment*, 45 *La. L. Rev.* 625, 627-64 (1985) (tracing evolution of jurisdiction over takings claims).

That Congress initially retained control over takings claims does not undermine my claim that passage of the Fifth Amendment represented a departure from previous takings theory (although, given our court-centered views, this may not be immediately apparent). In a system, such as the British system, where Parliament is sovereign, the legislature has the ultimate power to decide whether to grant compensation. See *supra* note 15. By contrast, in a system in which the People are sovereign and the written constitution creates government and limits its powers, the legislature must provide compensation when the constitution mandates it. For a discussion of the Blackstonian conception of parliamentary sovereignty and "the peculiar American idea of a constitution," see Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 350, 600-02 (1969). While Congress was the forum for takings claims, it did not have discretion to deny takings claims

few exceptions was the 1857 case *Smith v. Corporation of Washington*.⁷⁰ The Court there found that the Takings Clause did not require compensation when the Washington, D.C. municipal government lowered the grade of a road adjoining a lot, thus rendering the entryway to a home unusable and obliging the homeowner to construct a new entryway. "The plaintiff may have suffered inconvenience and been put to expense in consequence of such [regrading];" the Court acknowledged, but found that the harm was "what the law styles '*damnum absque injuria*.' Private interests must yield to public accommodation"⁷¹ In 1879, in *Transportation Company v. Chicago*,⁷² and in 1897, in *Gibson v. United States*,⁷³ the Court similarly found that compensation was not due when public works indirectly caused harm to private property. In *Transportation Company*, access to the company's property was blocked during construction of a tunnel and improvement of the adjoining street. In *Gibson*, a dike altered the flow of water to the property-owner's landing. The result was the same in both cases. As the Court expansively stated in *Transportation Company*, "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."⁷⁴

mandated by the Takings Clause. See Christine Desan, *Legal Immunity and Legislative Obligation: Institutional Understandings of Remedy in the Early Republic* 3 (Oct. 8, 1993) (unpublished manuscript, on file with author) ("Nor did the fact that recourse against the government was *legislative* rather than *judicial* in-and-of-itself vitiate the right of the citizen to relief or the responsibility of the government to make reparations."). Moreover, prior to the Tucker Act, claims under the Takings Clause were still brought, even though money could not be obtained from the federal government. For example, in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), plaintiff sought a determination that the Legal Tender Act of 1862 was unconstitutional. Suits could also be brought against the Corporation of the District of Columbia. See *Smith v. Corporation of Washington*, 61 U.S. (20 How.) 135 (1858). Finally, even if the early practice was not to allow judicial resolution of takings claims, it is not clear that this was the original intent. In introducing the Bill of Rights, for example, Madison indicated that the rights were judicially enforceable. See *infra* text accompanying note 279; see also Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 Colum. L. Rev. 1630, 1660-61 & nn. 158-61 (1988) (discussing historical evidence concerning whether Takings Clause was intended to be self-executing).

70. 61 U.S. (20 How.) 135 (1858).

71. *Id.* at 148.

72. 99 U.S. 635 (1879).

73. 166 U.S. 269 (1897).

74. *Transportation Co.*, 99 U.S. at 642; see also *Gibson*, 166 U.S. at 275 (following *Transportation Co.*). The limit to this overall principle that no compensation was due in the absence of a physical taking was established by *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872). In *Pumpelly*, the Green Bay Company erected a dam, pursuant to a state statute, that flooded Pumpelly's land, and Pumpelly sought compensation on the grounds that the flooding was a taking. Since the Green Bay Company was acting pursuant to state, rather than federal, authority and since the Takings Clause had not at that time been held applicable to the states, the claim was brought under the Takings Clause of the Wisconsin Constitution. See *id.* at 166-67. The Supreme Court, however, treated the state's

Smith, *Transportation Company*, and *Gibson* all involved governmental actions that had physical consequences. The Court also consistently refused to find takings where the claim was simply that government actions had lowered the value of property. The leading early decision was in the *Legal Tender Cases*,⁷⁵ in which the Court confronted the question whether the Legal Tender Act of 1862, by making all debts payable in government-issued currency, violated the Just Compensation Clause by devaluing debts that had been payable only in gold. In finding that it did not, the Court observed:

[The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.⁷⁶

compensation requirement as equivalent to the national compensation requirement. See *id.* at 177. Drawing on precedent, the Green Bay Company responded that "[Pumpelly's] lands have not been *taken or appropriated*. They are only affected by the overflow occasioned by raising the water in Lake Winnebago." *Id.* at 174. The Court unanimously rejected this argument, stating:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that the if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

Id. at 177-78. The decision thus contained the seeds of the reconceptualization of the Takings Clause that was to occur subsequently, since it explicitly recognized that the harm suffered by Pumpelly was a loss of "value." But the *Pumpelly* Court carefully limited its holding to cases "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness." *Id.* at 181. In other words, the government action in *Pumpelly* gave rise to a compensation requirement because it was a *de facto* physical taking. Initially, the Court construed *Pumpelly* as limited to this very narrow category of cases. See Bosselman et al., *supra* note 12, at 117-23 (discussing cases). For example, *Mugler v. Kansas*, 123 U.S. 623, 667-68 (1887), distinguished *Pumpelly* on these grounds.

75. 79 U.S. (12 Wall.) 457 (1871).

76. *Id.* at 551-52.

Similarly, in a series of decisions, the Court found that police power regulations were not compensable takings. The principal Supreme Court decision in this line is *Mugler v. Kansas*,⁷⁷ in which the Court upheld a Kansas prohibition statute that, among other things, declared places where liquor was manufactured to be common nuisances and directed that they be closed.⁷⁸ *Mugler*, a beer-maker, claimed that the act represented an uncompensated taking. Writing for the majority, Justice Harlan rejected this claim. His opinion reflected the view that the judiciary had only a limited role in reviewing regulations. "It belongs," he stated, "to [the legislative department] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or public safety."⁷⁹ Turning to the relationship between police power regulations and the compensation requirement, Justice Harlan observed:

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.⁸⁰

Thus, if a regulation were constitutionally valid, compensation was not required, no matter how much the regulation affected the value of private property.⁸¹

77. 123 U.S. 623 (1887).

78. See *id.* at 662–63.

79. *Id.* at 661.

80. *Id.* at 668–69.

81. For similar results, see, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance barring brickyard upheld, even though value of land diminished by over 90%); *Chicago, B. & Q. Ry. v. Illinois*, 200 U.S. 561 (1906) (no compensation required when railroad forced to tear down and rebuild bridge for reasons of public safety); *New Orleans Gas Light Co. v. Drainage Comm'n*, 197 U.S. 453 (1905) (no compensation required when gas company ordered to change location of underground gas pipes to accommodate drainage system); *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226 (1897) (expenses imposed on railway by public safety measures do not require compensation); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding statute banning sale of oleomargarine).

II. MISUNDERSTANDING (OR IGNORING) THE ORIGINAL UNDERSTANDING

The predecessor clauses to the Fifth Amendment's Takings Clause, the original understanding of the Takings Clause itself, and the weight of early judicial interpretations of the federal and state takings clauses all indicate that compensation was mandated only when the government physically took property. Despite this clear history, the Supreme Court in 1922 in *Pennsylvania Coal* held that a government regulation could give rise to a requirement of compensation. Neither that decision, nor any subsequent Supreme Court decision, nor any of the leading takings scholars, has seriously considered the possibility that there was a principle of relevance today that would explain why the requirement of compensation originally applied only to physical seizures of property.

A. *Pennsylvania Coal*

Pennsylvania Coal has repeatedly been described as the central case in modern takings law. Chief Justice Rehnquist observed in 1987 that it "has for 65 years been the foundation of our 'regulatory takings' jurisprudence."⁸² Professor Ackerman called it "both the most important and most mysterious writing in takings law."⁸³ Professor Epstein has noted that "*Pennsylvania Coal* has long been regarded as perhaps the single most important decision in the takings literature,"⁸⁴ adding:

Its clear insistence that the just compensation requirement bites in at least some instances of general regulation has been the major reason why takings law has not been wholly swallowed up by an expansive construction of the twin exceptions to the takings clause—the police power and implicit in-kind compensation—that are necessarily part of the overall development of takings doctrine.⁸⁵

Pennsylvania Coal represented the culmination of Justice Holmes's career-long critique of a physicalist view of property and the attendant view of the Takings Clause. As a young lawyer, Holmes criticized the use of the police power doctrine to justify governmental actions that affected property values without providing compensation. In an 1872 book review, he suggested that the term police power was "invented to cover certain acts of the legislature which are seen to be unconstitutional, but

82. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

83. Bruce A. Ackerman, *Private Property and the Constitution* 156 (1977).

84. Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 12.

85. *Id.* For detailed discussions of the case, see Joseph F. DiMento, *Mining the Archives of Pennsylvania Coal: Heaps of Constitutional Mischief*, 11 J. Legal Hist. 396 (1990); Lawrence M. Friedman, *A Search for Seizure: Pennsylvania Coal v. Mahon* in Context, 4 L. & Hist. Rev. 1 (1986); E. F. Roberts, *Mining with Mr. Justice Holmes*, 39 Vand. L. Rev. 287 (1986); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. Cal. L. Rev. 561 (1984).

which are believed to be necessary."⁸⁶ On the Massachusetts Supreme Judicial Court, he wrote one of the first opinions to suggest that a governmental regulation that undermined the value of property too greatly could be a taking. In *Rideout v. Knox*,⁸⁷ the court upheld a statute that barred property owners from building fences more than six feet in height. Holmes stated that the statute did not give rise to an obligation to compensate, but that a greater restriction might have done so:

It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; larger ones could not be, except by exercise of the right of eminent domain.⁸⁸

Holmes was not alone in his critique of takings case law. As intangible property replaced land as the dominant form of property in the economy, other legal thinkers also concluded that the reach of takings law had to be expanded.⁸⁹ For example, in his influential 1888 *Treatise on the Law of Eminent Domain in the United States*, John Lewis attacked earlier judicial decisions holding that only physical seizures were takings.⁹⁰ He declared, "We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property."⁹¹ For Lewis, this insight mandated a dramatic expansion of the reach of the Takings Clause beyond its earlier limits: "If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property . . . though his title and possession remain undisturbed"⁹²

86. Book Review, 6 Am. L. Rev. 140, 141-42 (1871-1872) (reviewing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (2d ed., Boston, Little Brown & Co. 1871)); see also Bosselman et al., *supra* note 12, at 124 (ascribing anonymous book review to Holmes).

87. 19 N.E. 390 (Mass. 1889).

88. *Id.* at 392.

89. The leading historical statement of this view is Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 146-48 (1992), and the presentation in this section of the transformation in views of property follows his analysis. For an early treatment of this shift in the Supreme Court's conception of property, see John R. Commons, *The Legal Foundations of Capitalism* 14 (photo. reprint 1974) (1924); see also Horwitz, *supra*, at 145-46 (discussing Commons's critique of Supreme Court cases); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 Buff. L. Rev. 325, 333-35 (1980) (discussing "dephysicalization" of concepts of property in nineteenth century).

90. See John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 57 (Chicago, Callaghan & Co. 1888).

91. *Id.* § 54.

92. *Id.* § 56.

Similarly, beginning in the 1870s, state courts started to break from the view that takings clauses only protected physical possession and to embrace the idea that the clauses protected value. As Lewis observed, "The law as to what constitutes a taking has been undergoing radical changes in the last few years."⁹³ The case that began that shift was the New Hampshire Supreme Court's 1872 decision *Eaton v. Boston, Concord & Montreal Railroad*.⁹⁴ The court criticized earlier caselaw holding that a taking of property meant "a total assumption of possession."⁹⁵ Such a view was "founded on a misconception of the meaning of the term 'property,' as used in the various State constitutions."⁹⁶ The correct view was that "[p]roperty is the right of any person to possess, use, enjoy, and dispose of a thing."⁹⁷

As it confronted constitutional challenges to utility and railroad rate regulations, the Supreme Court also came to embrace the notion that the Takings Clause protected value, a view championed by Justice David Brewer, "one of the most conservative members of a notoriously conservative bench."⁹⁸ Thus, in the 1894 railroad rate regulation case, *Reagan v. Farmers' Loan & Trust Co.*,⁹⁹ he wrote for the Court: "[T]he forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."¹⁰⁰ But these cases—in which the Court permitted regulation so long as it was not found to be confiscatory—were of limited scope: They involved businesses clothed with a public interest—like utilities or railroads or apartments in wartime.¹⁰¹ At the time of

93. *Id.* at § 57.

94. 51 N.H. 504 (1872). Lewis described it as "[t]he leading case upon the subject, and the one which has contributed more than any other towards bringing about the change [in takings law]." Lewis, *supra* note 90, § 58. The other critical case in the shift was the Supreme Court's decision in *Pumpelly*. But *Pumpelly*'s significance lay more in the way it was subsequently interpreted, than in its actual holding or rationale, since, unlike *Eaton*, it did not explicitly reject the premises of earlier takings law. See *supra* note 74.

95. 51 N.H. at 511.

96. *Id.*

97. *Id.* (quoting *Wynehamer v. People*, 13 N.Y. 378, 433 (1856)). For a collection of post-*Eaton* cases adopting a similar approach, see Lewis, *supra* note 90, § 59 & n.1.

98. Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 Va. L. Rev. 187, 215–16 (1984).

99. 154 U.S. 362 (1894).

100. *Id.* at 399. For a discussion of Brewer's takings jurisprudence, see Siegel, *supra* note 98, at 215–23; see also Horwitz, *supra* note 89, at 160–64 (discussing rate regulation and dephysicalization of property); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1914–27 (1992) (discussing Supreme Court's review of regulations).

101. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 155–56 (1921); *Northern Pac. Ry. v. North Dakota*, 236 U.S. 585, 596–96 (1915); *Louisville & Nashville R.R. v. Central Stock Yards Co.*, 212 U.S. 132, 143–44 (1909); *Lake Shore & Mich. S. Ry. v. Smith*, 173 U.S. 684, 695–96 (1899). For an analysis of these cases along the lines indicated in the text, see Lunney, *supra* note 100, at 1909–21. For a discussion of the phrase "clothed with a public

Pennsylvania Coal, Supreme Court case law was still consistent with the position enunciated in *Mugler*: If something was so harmful as to justify regulation under the police power, it could be regulated without compensation, regardless of the effect of the regulation on value.¹⁰²

Pennsylvania Coal involved a challenge to Pennsylvania's Kohler Act, which barred coal companies from removing coal when such removal would cause subsidence. An exception was recognized for lots on which the coal company owned the surface rights. The Court found that this regulation violated the Takings Clause. Writing for the majority, Holmes framed the decision in terms of first principles, and simply ignored the precedents in which the Court had held that regulations did not fall within the Takings Clause.¹⁰³ In his opinion, Holmes stated:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.¹⁰⁴

The previous brightline test—regulations were never a taking—was replaced by a far more imprecise test: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹⁰⁵ It was the role of the court to determine when a regulation "goes too far," and one factor that the court was to consider was the "extent of the diminution"¹⁰⁶ of value caused by the regulation. Underlying this view was a suspicion of the legislature. "When this seemingly absolute protection [for property] is found to be

interest" in the caselaw, see *id.* at 1914. For the origins of the doctrine that regulation of property affected with a public interest was valid, see *Munn v. Illinois*, 94 U.S. 113, 126 (1877); Scheiber, *supra* note 69 (placing *Munn* in context).

102. For leading cases, see *supra* note 81. It should be added, however, that there was some foreshadowing in Supreme Court caselaw of the decision in *Pennsylvania Coal*. In particular, in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), Holmes, writing for the majority, in dicta advanced an approach to the constitutionality of police power regulations similar to that adopted in *Pennsylvania Coal*. He observed that a building height restriction might be a valid exercise of the police power, but if it rendered the lot "wholly useless . . . the police power would fail . . . [requiring] compensation and the power of eminent domain." *Id.* at 355.

103. See *supra* text accompanying notes 77–81 and note 81.

104. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

105. *Id.* at 415.

106. *Id.* at 413.

qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."¹⁰⁷

That an overwhelmingly conservative Supreme Court would reach the *Pennsylvania Coal* result is not surprising. By extending the Takings Clause beyond physical takings, *Pennsylvania Coal* enabled the judiciary to review the full range of majoritarian decisionmaking concerning property rights. The use of a balancing test—a regulation is invalid if it “goes too far”—paralleled the earlier rise of similar tests in the context of substantive due process, which also permitted the judiciary to scrutinize a broad range of majoritarian decisions.¹⁰⁸

Given his strong support of active government intervention in the economy, it is similarly unsurprising that Justice Brandeis dissented. His opinion reflects the narrow reading of the Takings Clause established by precedent: “[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.”¹⁰⁹ In contrast, Holmes’s decision puzzled contemporary commentators and has provoked extensive academic commentary since then. As one Holmes biographer has observed, Holmes’s approach in *Pennsylvania Coal* is “almost exactly the reverse” of his approach in his due process dissents, in which the police power took precedence over individual rights.¹¹⁰ But his views in the takings area were consistent. Both *Pennsylvania Coal* and *Rideout*¹¹¹ reflect a belief that property is properly viewed as value, not physical possession, and that the Takings Clause should therefore protect more than physical possession. Holmes’s position seems to be the product not of his larger jurisprudential concerns, but of his embrace of a syllogism: The Takings Clause protects property. Property is value. Therefore, the Takings Clause protects value.¹¹²

107. *Id.* at 415.

108. See James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 *Cornell L. Rev.* 87, 123 (1993).

109. *Pennsylvania Coal*, 260 U.S. at 417 (Brandeis, J., dissenting).

110. See G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 402 (1993).

111. For further discussion of *Rideout*, see *supra* text accompanying notes 87–88.

112. For a related suggestion concerning the underpinnings of Holmes’s opinion in *Pennsylvania Coal*, see Rose, *supra* note 85, at 565 n.22. Professor Rose speculates that Holmes may have treated the case as a takings case, rather than one involving the impairment of an obligation of contract, because he was influenced by Wesley Hohfeld’s analysis of property rights. She notes: “Hohfeld’s theory suggested that ‘contract’ or ‘property’ rights were interchangeable nomenclature for legal relationships.” *Id.*; see also Bosselman et al., *supra* note 12, at 124–26 (discussing consistency of Holmes’s critique, throughout his career, of traditional distinction between police power and eminent domain power). For an alternative explanation of Holmes’s takings jurisprudence, see Patrick J. Kelley, *Holmes’s Early Constitutional Law Theory and its Application in Takings Cases on the Massachusetts Supreme Judicial Court*, 18 *S. Ill. U. L.J.* 357, 413 (1994).

Holmes's position has an intrinsic appeal. Why should one form of property receive strong protection under the Takings Clause and others none? There are, however, two problems with the *Pennsylvania Coal* approach. First, compared to the earlier approach, it makes the decision about when courts should direct compensation a very difficult one. The text, original understanding, and early interpretations of the Takings Clause explain clearly when a court should order compensation—when the government physically takes private property.¹¹³ In contrast, the *Pennsylvania Coal* inquiry into when regulation “goes too far” is open-ended and unconstrained. Second, the *Pennsylvania Coal* approach rests on the implicit premise that the question *why* the framers protected physical possession rather than other forms of property does not merit serious inquiry. In other words, Holmes assumes that, because anything of economic value is property, anything of economic value also merits protection under the Takings Clause. Despite these problems, *Pennsylvania Coal* established the pattern that has dominated modern takings law. The Supreme Court has consistently held that a regulation that “goes too far” can give rise to a compensable taking.¹¹⁴

B. *The Modern Supreme Court, Original Understanding, and Takings Law*

In fashioning a modern takings jurisprudence, the Supreme Court has essentially ignored the original understanding of the Takings Clause.¹¹⁵ As Professor Richard Epstein has observed, “Historical argu-

(arguing that Holmes attempted to establish coherence between takings law and common law protection and policies).

113. This is not to claim that the pre-*Pennsylvania Coal* test did not have any gray areas. The question of when and if government acts that physically invaded an individual's property were takings—as in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)—was difficult, but this was a much smaller area of uncertainty than that created by *Pennsylvania Coal*. For a more detailed discussion of *Pumpelly*, see *supra* note 74.

114. For recent examples of cases invoking the *Pennsylvania Coal* formulation that a regulation that “goes too far” is a taking, see, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 853 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987); *Hodel v. Irving*, 481 U.S. 704, 718 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

115. The Court's oft-cited opinion in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), is perhaps the classic example of this disregard. *General Motors* was a 1945 case in which the Court considered the appropriate measure of just compensation when the Government took over the unexpired term of a lease of a warehouse that had been equipped for GM's business. Construing the meaning of the word “property” in the Fifth Amendment, Justice Roberts observed:

It is conceivable that the [word “property”] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

ments have played virtually no role in the actual interpretation of the clause."¹¹⁶ This statement requires one caveat: To the extent that the original understanding was that physical possession by the government necessitated compensation, modern case law is true to that understanding.¹¹⁷ In the realm of regulatory takings, however, the original understanding has been all but disregarded. The Court has not treated seriously the possibility that there was some reason of relevance to modern jurisprudence why regulations did not originally fall within the ambit of the clause. Strikingly, even originalists do not use history to interpret the Takings Clause. "Even Justice Black," Professor Bruce Ackerman has ob-

Id. at 377-78 (footnote omitted) (citing John Lewis, *Eminent Domain* §§ 63, 64 (3d ed. 1909)). In a brief span, the Court raises the possibility that property under the Takings Clause was originally conceived to mean physical possession, derides that conception—it is "vulgar and untechnical"—and then adds that the clause has never in fact been so interpreted. Rather than discussing (or even citing) the Supreme Court's early case law in which it was so interpreted, it merely cites the treatise of the early champion of the broad reading of the Takings Clause, John Lewis. Even the citation is misleading. The cited section of Lewis's treatise is devoted to his conception of the "true idea of property," not the actual case law. See Lewis, *supra* note 90, § 54. A subsequent section of the treatise does cite case law supporting Lewis's view that the takings clauses reach governmental actions other than physical takings. It begins, however, with the statement, "The law as to what constitutes a taking has been undergoing radical changes in the last few years." Id. § 57. Lewis observes that the earlier view had been that the Takings Clause only reached physical appropriations, and cautions that there continues to be modern case law to that effect. See id. §§ 57-58. In other words, the cited material from Lewis's treatise supports the position that the Takings Clause was originally interpreted in a way directly contrary to that indicated in the opinion. For examples of cases citing *General Motors*, see *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 n.6 (1980).

116. Epstein, *supra* note 8, at 29.

117. *Loretto* indicates the continuing power of the older notion that any physical invasion gives rise to a compensable taking. In that case, the Court found that the laying of a cable wire across an apartment building gave rise to a compensable taking, even though the invasion was trivial. Although it did not appeal to the original understanding *per se*, Justice Marshall's opinion for the Court cited a series of late nineteenth and early twentieth century cases involving either the permanent flooding of property or the laying of telegraph wires in which the Court held or indicated in dicta that such permanent physical invasions were takings. See *Loretto*, 458 U.S. at 427-30. At the same time, even in this realm, not all members of the Court have accepted the relevance of the early case law. Justice Blackmun caustically observed that the majority decision was "curiously anachronistic." Id. at 442 (Blackmun, J., dissenting). Dismissing the relevance of the early cases, Blackmun stated:

The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age.

Id. at 446-47. He argued that "takings questions should be resolved through 'essentially ad hoc, factual inquiries,' into 'such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'" Id. at 444 (citations omitted) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) and *PruneYard*, 447 U.S. at 83, respectively).

served, "lacked the courage of his convictions when it came to the takings clause."¹¹⁸ The Court's recent decisions in *Lucas* and *Dolan* illustrate the willingness of its members to disregard the original understanding of the Takings Clause.

After David Lucas had paid almost \$1,000,000 for two beachfront lots, the South Carolina Beachfront Management Act was passed, significantly restricting the use of all beachfront property in the state. The state coastal commission, acting pursuant to the Act, subsequently barred Lucas from building any habitable structure on his lots. Lucas claimed that the commission's determination was a taking under the Fifth Amendment. In a majority opinion by Justice Scalia, which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined, the Court announced that when a regulation deprives property of all its value, compensation is due. It accordingly found that, because Lucas's property had lost all economic value, the regulation blocking development of the property was presumptively a taking. The Court, however, framed an exception to this general rule: Regulation that concerns a common law nuisance or is in accordance with background principles of property law does not give rise to a taking. The case therefore was remanded for a determination of the relevant South Carolina law.¹¹⁹

Justice Scalia offered two principal arguments in defense of the rule that deprivation of all economic value is a taking. First, "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."¹²⁰ While not appealing to original intent, in making this claim Scalia was implicitly starting from the premise that a requirement of compensation for physical appropriations lies at the core of the Takings Clause. From there, he analogized a total deprivation of economic value to a physical taking. Second, "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."¹²¹

Justice Blackmun's dissent was in significant part a critique of the majority opinion on historical grounds. "[T]he Fifth Amendment's

118. Ackerman, *supra* note 83, at 192 n.12; see also Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia, 74 B.U. L. Rev. 25, 61-62 (1994) (noting Black not an originalist in respect to interpretation of Takings Clause). For examples of Justice Black's ahistorical approach to the Takings Clause, see *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) (discussing "just compensation"); *United States v. Causby*, 328 U.S. 256, 274 (1946) (Black, J., dissenting) (holding that compensation should not be awarded to farm owner over whose farm military planes passed at low levels; observing that "[o]ld concepts of private ownership of land should not be introduced into the field of air regulation"); *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 551-54 (1946) (discussing "public use").

119. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900-02 (1992).

120. *Id.* at 2894.

121. *Id.* at 2894-95.

Takings Clause," he wrote, "originally did not extend to regulations of property, whatever the effect."¹²² In reaching this conclusion, he acknowledged that Professor Joseph Sax had noted that "‘contemporaneous commentary upon the meaning of the compensation clause is in very short supply.’"¹²³ Justice Blackmun, however, stated that "James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government,"¹²⁴ and he invoked Professor Sax's conclusion that the limited relevant evidence "indicate[d] that the clause was ‘designed to prevent arbitrary government action,’ not to protect economic value."¹²⁵

Justice Blackmun also argued that early decisions had typically interpreted the Takings Clause and its state constitutional analogues as requiring compensation for physical takings, not for regulations that affected values.¹²⁶ When courts eventually began to find that some regulations could give rise to a compensation requirement, they nonetheless permitted government to regulate harmful activities without providing compensation, even when the regulation deprived the property of all of its value and even though the regulated activity was not a common law nuisance.¹²⁷ He concluded:

[T]he Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.¹²⁸

Justice Blackmun's invocation of history is unusual in Supreme Court takings jurisprudence. Indeed, it is the judicial opinion that most seriously confronts the framers' vision of the clause and its original interpretations. But, significantly, Blackmun uses history to criticize, rather than to construct an alternative theory based on original intent.

122. *Id.* at 2915 (Blackmun, J., dissenting). My student Note, see Treanor, *supra* note 19, is one of the secondary sources on which Justice Blackmun relies. See *id.* at 2914–16, 1215 n.23 (Blackmun, J., dissenting).

123. *Id.* at 2915 n.23 (quoting Sax, *supra* note 7, at 58).

124. *Id.* (citing Treanor, *supra* note 19, at 711).

125. *Id.* (quoting Sax, *supra* note 7, at 58–60).

126. See *id.* at 2915.

127. See *id.* at 2915–17.

128. *Id.* at 2917.

Blackmun in *Lucas* did not seek to return to the original position that only physical appropriations and invasions required compensation. As Justice Scalia observed in reponse to the dissent's attack: "[E]ven [Justice Blackmun] does not suggest (explicitly, at least) that we renounce the Court's . . . conclusion in *Mahon* [that government regulations could fall within the Takings Clause]."¹²⁹ Indeed, while his dissent does not set forth an alternative conception of the Takings Clause, it seems clear that Blackmun believes that some regulations can be takings. Significantly, he opened his takings analysis with the statement: "I first question the Court's rationale in creating a category that obviates a 'case-specific inquiry into the public interest advanced,' if all economic value has been lost."¹³⁰ The notion of a case-specific inquiry implies that some regulations will be takings. Thus, even the one Justice to have made a serious invocation of original understanding in a takings case did not believe that original intent should be used to provide a rule of decision.¹³¹

Justice Scalia offered relatively little response to Blackmun's historical critique. He acknowledged that "Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."¹³² With citation to relevant precedent, he also recognized that before 1922 the Court took the same position as the theorists:

Prior to Justice Holmes' exposition in *Pennsylvania Coal v. Mahon* . . . it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases*, . . . or the functional equivalent of a "practical ouster of [the owner's] possession." *Transportation Co. v. Chicago*. . . See also *Gibson v. United States* . . .¹³³

Further, Justice Scalia observed that when James Madison originally proposed the Bill of Rights to Congress, he drafted the Takings Clause language too narrowly to reach regulatory takings.¹³⁴

Justice Scalia briefly offered several points in support of his interpretation. "[T]he text of the Clause," he wrote without elaboration, "can be read to encompass regulatory as well as physical deprivations. . . ."¹³⁵ He dismissed as "irrelevant" early state takings cases that preceded incorporation of the Takings Clause: "The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses—which as Justice

129. *Id.* at 2900 n.15 (Scalia, J.).

130. *Id.* at 2910 (Blackmun, J., dissenting) (citation omitted) (quoting *id.* at 2893 (Scalia, J.)).

131. See *supra* note 117 (discussing Blackmun's rejection of majority's appeal to history in *Loretto*).

132. *Lucas*, 112 S. Ct. at 2900 n.15.

133. *Id.* at 2892 (complete citations omitted).

134. See *id.* at 2900 n.15 (commenting on Madison's proposal that "[n]o person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation" (citation omitted)).

135. *Id.* at 2900 n.15.

Blackmun acknowledges, occasionally included *outright physical appropriation* of land without compensation—were out of accord with *any* plausible interpretation of those provisions.”¹³⁶ Moving to a broad level of generality, Justice Scalia concluded: “[W]e think the notion pressed by the [State] that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”¹³⁷

The power of such historical arguments is limited. Justice Scalia’s appeal to the text and his rejection of the early state case law do not rebut Justice Blackmun’s historical claims; they indicate, at most, that the text and state case law do not preclude the result reached by the Court. Moreover, Justice Scalia’s opinion does not even attempt to respond on originalist grounds to the fact that the pre-*Pennsylvania Coal* Supreme Court case law limited application of the clause to physical deprivations of property by the government. Thus, Justice Blackmun was able to offer the tellingly sarcastic comment: “I cannot imagine where the Court finds its ‘historical compact,’ if not in history.”¹³⁸

Justice Scalia’s approach in *Lucas* is at odds with his announced commitment to a doctrine of originalism and his explanation of what originalism means. For example, in “Originalism: The Lesser Evil,” Justice Scalia contended that original meaning as revealed in the contemporaneous record should control constitutional adjudication.¹³⁹ A constitutional clause should be treated as capable of evolution only “on the basis of some textual or historical evidence.”¹⁴⁰ Nonetheless, in *Lucas*, Justice Scalia seemed to be treating the Takings Clause as capable of evolution, without making a case for why it should be so treated.

Lucas is an anomaly in that the original understanding is at least discussed. At the same time, the case neatly illustrates the irrelevance of the original understanding for modern takings jurisprudence. The Justice who invokes original understanding apparently does not actually believe that it should be used to decide the case. The Justice who is most closely

136. *Id.* (citations omitted). For the relevant discussion in Justice Blackmun’s dissent, see *id.* at 2914–15 (Blackmun, J., dissenting).

137. *Id.* at 2900.

138. *Id.* at 2917 n.26 (Blackmun, J., dissenting).

139. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862–64 (1989) [hereinafter *Scalia, Originalism*]. For other discussions of Justice Scalia’s originalism, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182–84 (1989) (discussing textualism and originalism); L. Benjamin Young, Jr., *Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 Va. L. Rev. 581, 581–86, 589–96 (1992) (analyzing Justice Scalia’s use of history and tradition in adjudicating Fourteenth Amendment due process liberty interests); Arthur Stock, Note, *Justice Scalia’s Use of Sources in Statutory and Constitutional Interpretation*, 1990 Duke L.J. 160, 177 (“[Justice Scalia] is an originalist who seeks to interpret the Constitution as the Framers would have understood it.”).

140. *Scalia, Originalism*, *supra* note 139, at 862.

associated with a jurisprudence of original intent essentially dismisses it as irrelevant.

*Dolan v. City of Tigard*¹⁴¹ is a more typical example of the peripheral role of history in takings law. Florence Dolan wished to expand her hardware store and applied for a permit to develop the site. The Tigard City Planning Commission approved her application, subject to the conditions previously imposed by the municipality's Community Development Code for new developments in the central business area, where the store was located. In exchange for permission to expand, Dolan was required to dedicate to the city that part of her property lying within the 100-year floodplain for use in a storm drainage system, and she was also required to dedicate a fifteen-foot strip of land adjoining the floodplain for use as a bikepath. Dolan sought a variance, and when it was denied by the Planning Commission and by the Land Use Board of Appeals, she brought suit, claiming a taking.¹⁴²

The Supreme Court divided sharply in response to the case. Chief Justice Rehnquist wrote for a five-member majority that found in Dolan's favor, while Justices Stevens and Souter dissented. The Court held that the Takings Clause required that, to avoid compensation, there had to be an "essential nexus"¹⁴³ between a legitimate state interest and the permit condition and, in addition, that the government bore the burden of demonstrating the existence of "rough proportionality" between the harm associated with the expansion—additional water run-off and additional car and bike trips to the larger store—and the burdens imposed on Dolan.¹⁴⁴ The Court concluded that the findings relied on by the municipality did not satisfy the rough proportionality test and that burdens imposed in the absence of such a showing were unconstitutional conditions.¹⁴⁵

None of the the opinions in the case contains any focused discussion of original intent. Only Justice Stevens touched on the issue, and he did so obliquely. Observing that the Takings Clause had been incorporated into the Fourteenth Amendment and applied against the states, he added:

There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property. Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322 (1922). The so-called "regulatory takings"

141. 114 S. Ct. 2309 (1994).

142. See *id.* at 2313–15.

143. *Id.* at 2317.

144. *Id.* at 2319–20.

145. See *id.* at 2320–22.

doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.¹⁴⁶

Stevens thus criticized *Pennsylvania Coal* as akin to *Lochner*¹⁴⁷ in vesting unconstrained power in the judiciary. He then contended that the Court's use in *Dolan* of the unconstitutional conditions doctrine to evaluate a "mutually beneficial transaction between a property owner and a city" was, like Holmes's decision, a "judicial innovation,"¹⁴⁸ and suggested that this doctrine may provide the grounds for "a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era."¹⁴⁹ Despite these criticisms, Stevens did not suggest that the Court reevaluate the central tenets of that decision: that regulations can be compensable takings and that the Court, in evaluating regulations, should balance public benefit against private harm. Indeed, Stevens's position in the case—that the property-owner bore "[t]he burden of demonstrating that [the challenged] conditions have unreasonably impaired the economic value of the proposed improvement"¹⁵⁰—embraces these views. In other words, Stevens implicitly criticized the majority for again expanding the realm of judicial discretion, as it had previously done in *Pennsylvania Coal*, but he did not call for a return to the original understanding, nor did he suggest that the original understanding had any lesson to offer for contemporary jurisprudence.

C. Academic Commentary and Original Intent

As the above discussion indicates, the original understanding has played at most a marginal role in modern Supreme Court takings jurisprudence. Like the Court, scholars have not seriously considered the possibility that the framers' requirement of compensation for physical seizures but not for regulations might be based on a principle relevant to modern constitutional discourse. This section discusses the academic disregard of original intent and what are probably the two most prominent exceptions to this trend: Joseph Sax's "Takings and the Police Power"¹⁵¹ and Richard Epstein's *Takings*.¹⁵² Both Sax and Epstein use original intent to support their conceptions of takings law, yet dismiss the significance of the fact that the Takings Clause was originally limited in scope.

146. *Id.* at 2327 (Stevens, J., dissenting) (footnote and citations, except to *Pennsylvania Coal*, omitted).

147. *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum employment hours state legislation as violative of the Fourteenth Amendment's Due Process Clause).

148. *Dolan*, 114 S. Ct. at 2327.

149. *Id.* at 2329.

150. *Id.* at 2330.

151. Sax, *supra* note 7.

152. Epstein, *supra* note 8.

In doing so, they fail to grasp the full significance of the Takings Clause.¹⁵³

1. *Disregard of Original Intent.* — Typically, in proposing how the Takings Clause should be understood, modern theorists have devoted relatively little attention to the original understanding. Scholars have generally focused more on philosophy and economics than they have on history,¹⁵⁴ partly because of the paucity of historical evidence of the framers' intent.¹⁵⁵ In addition, some takings scholars do not rely on original intent because they are not originalists.¹⁵⁶ Holmes's reason for departing from established precedent suggests another reason why the original un-

153. Epstein and Sax, it should be added, are not the only prominent scholars to develop takings theories that draw in significant ways on original understanding. See, e.g., Bosselman et al., *supra* note 12, at 238–53 (discussing overruling *Pennsylvania Coal* as inconsistent with original intent); Kmiec, *supra* note 69, at 1639–47 (urging on originalist grounds various elements of takings doctrine, such as harm/benefit analysis and provision of remedy); Frank Michelman, Tutelary Jurisprudence and Constitutional Property, in *Liberty, Property, and the Future of Constitutional Development* 127, 129–35 (Ellen F. Paul & Howard Dickman eds., 1990) (proposing existence of historically grounded republican and liberal approaches to takings doctrine). But, like Sax and Epstein, none of these writers shares the project of this Article. They do not try to recapture why the framers protected only physical possession in order to use that underlying rationale as a basis for modern takings theory.

One article, however, that is similar in nature to this Article is Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267 (1988). Professor McConnell asks why the Contract Clause was intended to limit actions of the states, but not the national government, while the Fifth Amendment's Takings Clause was intended to do the reverse. He argues, in part, that the Contract Clause applied only to the states because factions were seen as a greater problem at the state level than at the national level. See *id.* at 288–93. This argument is correct, and I have drawn on it, see *infra* text accompanying note 308. He is less certain of why the Takings Clause did not apply to the states, but suggests that the clause “applies to the level of government most needful of restraint.” McConnell, *supra*, at 293. In contrast, I do not think that the framers were particularly fearful that the national, as opposed to the state government, would seize private property. I suggest *infra*, see note 308, that Madison limited the reach of the clause for political reasons. But Professor McConnell's argument that the Takings Clause was in part a response to the high costs associated with monitoring the military impresses me as correct, and I rely on it. See *infra* note 278 and accompanying text.

154. For examples of leading studies of takings law that advance theories in which the original understanding plays little or no role, see Ackerman, *supra* note 83; Farber, *supra* note 6; Levmore, *supra* note 6; Saul Levmore, *Takings, Torts and Special Interests*, 77 Va. L. Rev. 1333 (1991); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 Harv. L. Rev. 1165 (1967); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. Cal. L. Rev. 1393 (1991); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 Cal. L. Rev. 1299 (1989) [hereinafter Peterson I]; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 53 (1990) [hereinafter Peterson II]; Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 Yale L.J. 149 (1971).

155. See Ackerman, *supra* note 83, at 7–8; Bosselman et al., *supra* note 12, at 97–104.

156. See, e.g., Ackerman, *supra* note 83, at 7, 192 n.11.

derstanding has had only a limited influence on modern scholarship. Scholars have concluded that the early view of the Takings Clause reflected a physicalist view of property that is either incoherent or outdated in the modern economy. At best, this physicalist conception is merely one of the contemporary understandings of property and, as a contested definition, no longer establishes *the* correct reading of the clause.

For example, in "The Malthusian Constitution,"¹⁵⁷ Professor Thomas Grey highlighted changes in the conception of property:

Under the classical conception, actual dispossession was required before ownership rights were violated and property was taken.

By contrast, modern lawyers—or at least modern legal scholars—are nominalists about "ownership"; they see property in resources as consisting of the infinitely divisible claims to possession, use, disposition, and profit that people might have with respect to those things. There is, on this conception, no essential core of those rights that naturally constitutes ownership.

But the other side of the modern conception that sees property rights everywhere is a greatly enhanced toleration of their infringement.¹⁵⁸

Similarly, in *Private Property and the Constitution*,¹⁵⁹ Bruce Ackerman wrote: "Unlike our ancestors, we no longer count our wealth by looking first to our social property of land, farms, buildings. Instead, our principle means of support consist of legal property: stocks, bonds, pensions, an assortment of rights granted by the activist welfare state."¹⁶⁰ Frank Michelman in "Property, Utility, and Fairness"¹⁶¹ focused on the logical weakness of the earlier view. "At one time," he wrote, "it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation."¹⁶² But such a position could not withstand analytic scrutiny: "Wordplay—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint."¹⁶³

157. Thomas C. Grey, *The Malthusian Constitution*, 41 U. Miami L. Rev. 21 (1986).

158. *Id.* at 30.

159. Ackerman, *supra* note 83.

160. *Id.* at 166.

161. Michelman, *supra* note 154.

162. *Id.* at 1184.

163. *Id.* at 1186–87. The works of Ackerman and Michelman referred to suggest reasons why it may be particularly appropriate to find a taking when a governmental action interferes with physical possession (as opposed to when it simply diminishes value). The reasons advanced are, however, cultural, not originalist, and they also apply to certain governmental actions other than physical takings. In addition, the two authors reveal the weaknesses of these reasons. See Ackerman, *supra* note 83, at 113–167 (analyzing takings law as reflecting protection for "Layman's things"); Michelman, *supra* note 154, at 1234

Such critiques rest on the notion that the initial scope of the Takings Clause can be explained as reflecting a physicalist conception of property. As the next Part will discuss, the scope of the clause cannot be so simply explained. However, lack of concern with the question of why substantive constitutional protection of property rights was limited is characteristic not only of non-originalist theories of the Takings Clause. Originalists Sax and Epstein both present theories that fail to confront adequately the limitations of the Takings Clause.

2. *Joseph Sax*. — In his 1964 article, "Takings and the Police Power," Professor Sax argued that compensation was due only when the government, to advance its ends as an enterpriser, curtailed legitimate individual economic interests.¹⁶⁴ In support of this theory, Sax provided a path-breaking survey of the early history of eminent domain law that included discussions of both the writings of seventeenth- and eighteenth-century civil law thinkers and English and American authorities writing at roughly the time of the Fifth Amendment's ratification.¹⁶⁵ Sax argued that this early history rebutted "the notion, so commonly held, that the taking clause [sic] was to be a bulwark for the maintenance of the established distribution of wealth."¹⁶⁶ Thus, the Holmesian vision that the clause protected value was inconsistent with early understandings.

Sax acknowledged that there were relatively few historical sources, but he suggested that these sources reflected a concern with preventing governmental arbitrariness, particularly the "appropriation of property by the state for its own account to finance its own enterprise."¹⁶⁷ Thus, in his treatment of America and England, Sax highlighted Tucker's statement that the clause was meant to be a remedy against military impressment and observed that Blackstone's paradigmatic case for compensation con-

(discussing belief "that one thinks of himself not just as owning a total amount of wealth or income, but also as owning several discrete 'things' whose destinies he controls").

164. Sax formulated the test as follows:

[W]hen an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

Sax, *supra* note 7, at 67.

165. See *id.* at 54–60. Justice Blackmun relied heavily on Sax's account in *Lucas*. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2915–16 (1992) (Blackmun, J., dissenting).

166. Sax, *supra* note 7, at 53.

167. *Id.* at 59.

cerned the taking of land for a highway.¹⁶⁸ Sax also found support for his view in Chief Justice Marshall's statement in *Fletcher v. Peck*.¹⁶⁹

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.¹⁷⁰

While the language of *Fletcher* would seem to suggest a broad conception of the rights of private property, Sax argued that the case supported his thesis since it concerned the legitimacy of Georgia's invalidation of land grants for which it had already received money.¹⁷¹ "[E]xamples of takings given by the early writers all fit quite clearly into the enterprise capacity,"¹⁷² Sax concluded.

At the same time, however, Sax's enterprise theory was broader in its reach than early understandings of the Takings Clause. "[A] finding of enhancement of the resource position of a government enterprise," he wrote, "does not necessarily require a physical invasion, or an acquisition of a formal proprietary interest."¹⁷³ Sax contended that the distinction in the early case law between police power regulations, which were never compensable, and physical seizures, which always were, no longer made sense and that some regulations should therefore now give rise to a compensation requirement:

As the scope of government regulations grew . . . the economic impact of government regulation undermined the rationality of [the distinction between the police power and the eminent domain power]. Particularly with the growth of zoning, conservation legislation, and pervasive business regulation, the impact of the police power, however defined as qualitatively distinct, upon the traditional perquisites of private ownership could hardly be ignored.¹⁷⁴

Sax is unquestionably correct that the economy has changed and that the nature of government intervention in the economy has dramatically expanded. Nonetheless, significant government regulation was common even in the world of the framers.¹⁷⁵ Thus, given such regulation and the fact that the Takings Clause was not originally understood to bar it, the question is raised: Was there a limiting principle shaping the

168. See *id.* at 58-59; see also *supra* note 15 (Blackstone's statement); *supra* text accompanying note 53 (quoting Tucker's statement concerning the original understanding of the Takings Clause).

169. 10 U.S. (6 Cranch) 87 (1810).

170. *Id.* at 135.

171. See Sax, *supra* note 7, at 59-60.

172. *Id.* at 63.

173. *Id.*

174. *Id.* at 40.

175. See *supra* notes 29-39 and accompanying text.

Takings Clause that merits serious regard today? And it is a question that Sax does not resolve.

3. *Richard Epstein*. — Almost certainly, in recent years Professor Richard Epstein has influenced political discourse about the Takings Clause more than any other academic. In *Takings*, his chief work on takings doctrine, Professor Epstein invoked original intent—and specifically his claim that the framers were Lockean—to support his expansive conception of the Takings Clause. Under that view, “[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.”¹⁷⁶ Like Sax, however, Epstein fails to account for the fact that the Bill of Rights initially provided such limited protection for property rights.

Epstein’s invocation of history rests on his understanding of the general principles animating the Takings Clause and the Constitution, rather than on the specific construction that the framers gave the clause. According to Epstein, “The Lockean system was dominant at the time when the Constitution was adopted,”¹⁷⁷ and “the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.”¹⁷⁸ The Takings Clause,

176. Epstein, *supra* note 8, at 95.

177. *Id.* at 16.

178. *Id.* at 29. One problem with this claim is that, in his brief discussion of the takings issue in the *Two Treatises of Government*, Locke did not assert that the state had an obligation to compensate the affected individual; his concern was only with procedure. He wrote, “[T]he Prince, or Senate, however, it may have power to make Laws for the regulating of *Property* between the Subjects one amongst another, yet can never have a Power to take to themselves the whole or any part of the Subject’s [sic] Property, without their own consent.” John Locke, *Two Treatises of Government* § 407 (Peter Laslett ed., 1960) (1698). Epstein’s response to this problem is that “the takings clause should be read as being inspired by Locke’s treatise but not as following its language, or its logic, to the end.” Epstein, *supra* note 84, at 2 n.5 (discussing argument in *Takings*). A contrary reading of Locke is that the consent to taking of property occurs when individuals surrender their natural rights and enter the social contract; according to this view, when the social contract is formed, individuals consent to subsequent legislation aimed at advancing the common good, even when that legislation is redistributive. See Note, Richard Epstein on the Foundation of Takings Jurisprudence, 99 Harv. L. Rev. 791, 804–05 (1986) [written by Deborah Goldberg]. The best evidence linking Locke to a compensation requirement does not figure in Epstein’s account: Locke’s authorship of compensation requirement in the Fundamental Constitution of the Carolinas. See *supra* text accompanying note 13. The varying readings in *Takings* and the Harvard Note are a manifestation of a larger debate about whether Locke’s thought was purely liberal. Compare C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* 203, 211 (1962) (Locke’s theory legitimizes unlimited appropriation) with James Tully, *A Discourse on Property: John Locke and His Adversaries* 152–54, 165 (1980) (unlimited appropriation sanctioned only if proviso of “enough and as good left in common for others” is satisfied).

To the extent that scholarly writings influenced the eventual rise of the just compensation principle, the most important authors may have been, not Locke, but civil law scholars. See J.A.C. Grant, *The “Higher Law” Background of the Law of Eminent Domain*, 6 Wis. L. Rev. 67, 69–81 (1931) (discussing role of natural law in early state

according to Epstein, mirrors Locke's philosophy about property, whose central premise is antiredistributivism. Thus, the Takings Clause embodies the following principle, which Epstein ascribes to Locke:

whenever any portion of [his property] is taken from [the property-owner], he must receive from the state . . . some equivalent or greater benefit as part of the same transaction. The categorical command that property shall not be taken without tacit consent must therefore be rewritten to provide that property may be taken upon provision of just compensation.¹⁷⁹

The obvious problem with this approach to the historical meaning of the clause is that the clause was initially read to have a limited scope. Epstein offers two reasons for why there is no need "to take into account the actual historical intention of any of the parties who drafted or signed the document."¹⁸⁰ First, examination of contemporaneous statements about the meaning of constitutional clauses "may well increase confusion."¹⁸¹ In this regard, Epstein stresses the diversity of meaning which different framers could have attached to a constitutional provision and the range of intent that animated their public statements (although he does not offer specific examples of different understandings of the Takings Clause).¹⁸²

Epstein's second rationale for ignoring the specific constructions that historical actors gave the clause is that the framers did not realize the clause's implications. Thus, to use an example offered by Epstein, governmental regulation of wages and prices are a taking, even if the framers did not view them as such:

[The framers] may have meant to endorse both the takings clause and wages and price controls without knowing the implicit tension between them. If they cannot have both, then their explicit choice takes precedence over their silent one.

takings cases and noting appeals to Grotius, Pufendorf, and Bynerhoeck); Scheiber, *supra* note 69, at 362. At the same time, even these scholars did not recognize a legal right to compensation. As Professor Lenhoff wrote, "[T]he references of [civil law scholars] to a right of an individual to receive compensation were in the nature of moral suggestions, rather than statements of law." Lenhoff, *supra* note 15, at 596. For example, Grotius, the seventeenth century civil-law scholar who has been dubbed "the father of the compensation clause," Sax, *supra* note 7, at 54, recognized that compelling state needs could legitimate a decision not to award compensation:

[T]hrough the agency of the king even a right gained by subjects can be taken from them in two ways, either as a penalty, or by the force of eminent domain. But in order that this may be done by the power of eminent domain the first requisite is public advantage; then, that compensation from the public funds be made, *if possible*, to the one who has lost its right.

Hugo Grotius, *The Law of War and Peace*, Bk. II, ch. XIV, § VII (Francis W. Kelsey trans., 1925) (1625) (emphasis added). For further discussion of Grotius, see Sax, *supra* note 7, at 54.

179. Epstein, *supra* note 8, at 15.

180. *Id.* at 26.

181. *Id.* at 27.

182. See *id.*

Suppose the framers believed both A and X, when A entails not-X. If A is the constitutional text, then X is not allowed.¹⁸³

Epstein does not specifically confront the broader issue of why regulations should now be treated as takings when they were not so treated until the twentieth century. However, the answer he would offer is clear from his discussion of historical intention and, specifically, from his treatment of wage and price controls. Although the framers' passage of the Takings Clause testifies to their opposition to the redistribution of wealth, they did not grasp the fact that regulation could run afoul of that principle; they did not see the "implicit tension."¹⁸⁴ Now that it is apparent, the principle should triumph over the concrete application because the principle received constitutional recognition.¹⁸⁵

Epstein's presentation of original intent and the Takings Clause is particularly worthy of analysis because his view reflects a widely shared understanding of the ideology underlying the Takings Clause. For example, Professors Laurence Tribe and Michael Dorf have offered a similar reading of the historical record:

Undoubtedly, one of the most influential thinkers for American statesmen of [the late eighteenth century] was the seventeenth-century English political philosopher John Locke. . . . Whether or not a modern reader thinks that Locke's theory [of property] is a sensible one, something like it is necessary to make sense of, and therefore give content to, the Takings Clause.¹⁸⁶

Despite its broad acceptance, consideration of Epstein's argument forces us to confront the question: If the framers opposed government acts with

183. *Id.* at 28.

184. *Id.*

185. See *id.* However, Epstein does not believe that every government regulation that diminishes the value of private property gives rise to a compensable taking. Thus the state can prevent common law wrongs without providing compensation. Here, again, Epstein's argument draws on his reading of Locke, rather than on any concrete historical understanding of what the Takings Clause meant to the framers. Because, in Lockean theory, the state stands in place of the individual and because the individual could take action against any person who engages in wrongful conduct against her, it follows that the state can act against any individual who is engaging in wrongful conduct against another. See *id.* at 111-12.

186. Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 70-71 (1991); see also Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 *Or. L. Rev.* 603, 608 (1993) ("Heeding their own unhappy history of government appropriation, the framers of the United States Constitution integrated Lockean notions into their new republic."); John A. Humbach, "Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments, 42 *Cath. U. L. Rev.* 771, 776-77 (1993) (Locke was one of the "philosophical forerunners of the clause's ideology"); Kmiec, *supra* note 69, at 1635 ("Significantly, the drafter of the taking clause [sic], James Madison, incorporated the Blackstonian definition in his writing on property. . . ."). In an earlier work, I also treated the original intent animating the Takings Clause as a reflection of Lockean liberalism. See Treanor, *supra* note 19, at 704-05, 709-713; see also *infra* note 226 (discussing shift in my thought on the ideological background of the Takings Clause).

redistributive consequences as strongly as Epstein asserts, why did they craft a Takings Clause that required compensation only for physical seizure? Epstein's suggestion—that they did not fully realize the clause's implications—is unsatisfying in light of the obvious thoughtfulness of framers like Madison, and thus another explanation is needed.¹⁸⁷ The answer lies, not in some shortsightedness in their thinking, but rather in the fact that they were not committed to absolute, liberal protection of property rights.

III. UNDERSTANDING THE ORIGINAL UNDERSTANDING

If we are to take seriously the original understanding of the Takings Clause, we cannot focus only on its animating principle, but must also focus on the clause's limiting principle. As Professor James Ely has written, "For all their devotion to property rights, the framers were content to rely primarily on institutional and political arrangements to safeguard property owners."¹⁸⁸ Why did the people who drafted and enacted the Takings Clause and its state counterparts decide that the interest in physical possession of property needed substantive protection, but that other property interests did not? To put the question in what is perhaps its simplest and most striking form: Why does the Bill of Rights contain a Takings Clause, but not a Contract Clause? This Part examines both why the compensation requirement emerged *and* why other property rights did not receive similar constitutional protection.

This Part begins by considering why the framers did not require compensation for any government act that affected the value of property. To this end, it examines the prevalent views of property during the framing period. Drawing on recent historical scholarship about the ideologies of republicanism and liberalism at the time of the framing, it suggests—contrary to Epstein—that Lockean liberalism, which treats the right to property as prepolitical, was not the single dominant ideology of the time. Rather, republicanism, which values the right to property but subjects it to majoritarian delineation, was also extremely influential. The power of the republican view of property during this period shows that there was no consensus among the framers that majoritarian decisionmakers could not be trusted to determine the appropriate level of protection for property interests.

After advancing this explanation for the initially limited scope of the Takings Clause, this Part then considers why possessory property interests in particular received substantive protection. It rejects the explanation that the limited scope of the Takings Clause resulted from the framers'

187. For a critical analysis of Epstein's use of history in the context of the Takings Clause and the Contract Clause, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 556–67 (1995). Epstein's response can be found in Richard A. Epstein, *History Lean: The Reconciliation of Private Property and Representative Government*, 95 Colum. L. Rev. 591 (1995).

188. Ely, *supra* note 46, at 47.

limited conception of property and regulation. Instead, it examines the rise of the just compensation requirement in various state constitutions and in the Bill of Rights and concludes that in each case it was produced by the fear of process failure.

Finally, this Part turns to Madison, whose sophisticated conception of the clause and its purpose accords with the general reasons for which others sought special protection for physical possession of property. His conception of the clause reflected the synthesis of republicanism and liberalism in his political philosophy. At one level, Madison saw the clause as serving a hortatory function; it stood for the broad principle, which could be appealed to in political discourse, that governmental acts should not diminish the value of private property. The clause thus provided a broad recognition of a republican property right. At the same time, it put certain interests above majoritarian determination: when the federal government physically took property, compensation was necessarily owed. In other words, physical possession was protected as a liberal right. Physical possession received such heightened protection because of Madison's concern that the political process would not fairly consider certain possessory interests, specifically the ownership of land and slaves.

A. *Revolutionary Ideology and the Protection of Property*

Epstein's view that the Takings Clause should be understood as embodying the framers' Lockean liberalism accords with the dominant view among historians in the late 1950s and early 1960s. At that time, the conventional wisdom among historians was that the Revolution, the Constitution, and, indeed, all of American history reflected the broad acceptance in this country of Lockean liberalism.¹⁸⁹ Thus Louis Hartz, the leading proponent of this school of thought, concluded, "Locke dominates American political thought, as no thinker anywhere dominates the political thought of a nation. He is a massive national cliché."¹⁹⁰

Beginning in the mid-1960s, this consensus came under attack, largely because of three works. Bernard Bailyn in his *Ideological Origins of the American Revolution* argued that the dominant intellectual influence on the revolutionary generation was not Locke, but early eighteenth-century English opposition writers such as John Trenchard and Thomas Gordon, who subsequently had been largely forgotten.¹⁹¹ In *Creation of*

189. For other accounts of early American ideology in which the central philosophical influence is Lockean, see, e.g., Daniel J. Boorstin, *The Genius of American Politics* 78 (1953); Louis Hartz, *The Liberal Tradition in America* 140 (1955); Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 357 (1953) (stating that Locke "stand[s] out as [a] thinker[] whom the colonists seem to have read and pondered with special care"); see generally Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 *J. Am. Hist.* 11, 13-14 (1992) (discussing liberal consensus among historians).

190. Hartz, *supra* note 189, at 140.

191. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 35-36 (1967). Although Bailyn's non-Lockean explanation of the American Revolution and

the American Republic, Gordon Wood contended that republican ideology inspired the Revolution, although he also concluded that the Constitution represented a rejection of that ideology.¹⁹² In his 1975 *The Machiavellian Moment*, J.G.A. Pocock also powerfully advanced the thesis that revolutionary ideology was republican, although he believed that the primary sources of republican thought were not the English writers on whom Bailyn and Wood had focused, but rather Renaissance writers, such as Niccolo Machiavelli.¹⁹³ Historians Eric McKittrick and Stanley Elkins have recently observed that these three works "represent an extraordinary effort of rescue, a retrieval of something which in the course of time had become all but lost," and what had been lost was "the mind and sensibility of the founding generation."¹⁹⁴

While historians disagree on precise terminology and meaning,¹⁹⁵ republicanism can be differentiated from liberalism in a number of critical ways.¹⁹⁶ In particular, they differed in their conceptions of the nature

rediscovery of the importance of eighteenth-century English writers such as Trenchard and Gordon substantially influenced subsequent historical writings that advanced the republican thesis, *Ideological Origins* does not use the term "republicanism" and Professor Bailyn has subsequently argued that republicanism did not occasion the American Revolution. See Bernard Bailyn, *Faces of Revolution* 227 (1990).

192. See Wood, *supra* note 69, at 467.

193. See J.G.A. Pocock, *The Machiavellian Moment* 506 (1975).

194. Stanley Elkins & Eric McKittrick, *The Age of Federalism* 5 (1993).

195. Wood and Pocock generated two different schools of thought about the meaning of republicanism. For a discussion of the two, see Rodgers, *supra* note 189, at 19-21. Rodgers notes that one critical difference concerns the meaning of virtue. As Wood uses the term, virtue primarily means self-abnegation, sacrifice of individual interest to the common good. See, e.g., Wood, *supra* note 69, at 53. For Pocock, virtue consists largely of public-spirited participation in the life of the polity; virtue is civic virtue. See Pocock, *supra* note 193, at 73-76, 86-87. This distinction has been generally ignored in the legal literature. However, it is significant since the aspect of republicanism that many legal scholars have found attractive—its celebration of political participation—is largely absent from Wood's account. The second critical difference between *Creation of the American Republic* and *The Machiavellian Moment* concerns the timing of liberalism's triumph over republicanism. Wood indicates that republicanism had collapsed as an ideological influence by the time of the Constitution, and that the Constitution represented a rejection of republican politics. See Wood, *supra* note 69, at 135-36. In contrast, Pocock makes clear that republicanism continued to influence American politics even after the founding. See Pocock, *supra* note 193, at 462.

More recently, in *The Radicalism of the American Revolution*, Wood departed from his earlier position and indicated that republicanism continued to influence American politics in a significant way at least through the War of 1812, although he continues to see the Constitution as a response to the perceived problems of republicanism. See Gordon S. Wood, *The Radicalism of the American Revolution* 230-32, 327 (1993).

196. For reasons of clarity, it should be stressed that historians most commonly define the term liberal differently than philosophers and scholars of jurisprudence. In particular, the latter typically posit a fair distribution of societal resources as a precondition to rights assertion. In addition, the liberal, as historians generally use the term, fully accepts the legitimacy of the pursuit of self-interest, while the same is not necessarily true of the liberal, as philosophers and scholars of jurisprudence generally use the term. See Linda C. McClain, "Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence,

of rights and the role of property in the polity. Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest. Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property. Believing that the purpose of the state was to promote virtue, they saw sources of corruption in luxury and in commerce, and they campaigned against the pursuit of self-interest and were suspicious of the worlds of finance and manufacturing. For example, at the Constitutional Convention, John Dickinson stated that he "doubted the policy of interweaving into a Republican constitution a veneration for wealth [and] had always understood that a veneration for poverty & virtue, were the objects of republican encouragement."¹⁹⁷

At the same time, republicans treasured private property, and land in particular, as providing the individual with the autonomy that was a prerequisite for full participation in the polity. Thus, Professor Drew McCoy has written of the republican view of property:

The personal independence that resulted from the ownership of land permitted a citizen to participate responsibly in the political process, for it allowed him to pursue spontaneously the common or public good, rather than the narrow interest of the men—or the government—on whom he depended for his support. Thus the Revolutionaries did not intend to provide men with property so that they might flee from public responsibility into a selfish privatism; property was rather the necessary basis for a committed republican citizenry.¹⁹⁸

65 S. Cal. L. Rev. 1171, 1203-28 (1992) (discussing Rawls and Dworkin and arguing that the thought of neither is atomistic).

197. Remarks of John Dickinson (debate of July 26, 1787), in 2 *The Records of the Federal Convention of 1787*, at 118, 123 (Max Farrand ed., 1966) [hereinafter Farrand]. The definitions set forth in this and the following paragraphs are derived from Michelman, *supra* note 153, at 131-32; William Michael Treanor, *Taking the Framers Seriously*, 55 U. Chi. L. Rev. 1016, 1029-30 (1988) (reviewing Walter Berns, *Taking the Constitution Seriously* (1987)); Treanor, *supra* note 19, at 699-700, 704-05.

198. Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* 68 (1980). Professor Pocock has more recently offered a similar summary of why republicans believed private property important:

The citizen possessed property in order to be autonomous and autonomy was necessary for him to develop virtue or goodness as an actor within the political, social and natural realm or order. He did not possess it in order to engage in trade, exchange or profit; indeed, these activities were hardly compatible with the activity of citizenship.

J.G.A. Pocock, *Virtue, Commerce, and History* 103 (1985).

The relationship between property (particularly land) and citizenship was critical. Property led to independence. Jefferson observed that "dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition,"¹⁹⁹ and thus sought to include in the Virginia Constitution a provision granting fifty acres of property to every man who did not have any.²⁰⁰ Similarly, John Adams in 1776 noted that "power always follows property" and urged that government "make the acquisition of land easy to every member of society" or that it "make a division of . . . land into small quantities, so that the multitude may be possessed of landed estates."²⁰¹

The converse was that republican thought indicated either that the propertyless should be excluded from the full rights of citizenship or, at least, that there were significant dangers associated with granting them such rights.²⁰² That is why Jefferson, while he celebrated yeoman farmers, distrusted urban workers.²⁰³

Influenced by the work of sociologist Clifford Geertz,²⁰⁴ the methodological assumption behind Wood's and Pocock's treatments of ideology was that political discourse during a particular era is dominated by a single ideological paradigm.²⁰⁵ Pocock thus wholly excluded liberalism from his account of the Revolution: "Not all Americans were schooled in [the republican] tradition, but there was (it would almost appear) no alternative tradition in which to be schooled."²⁰⁶ For Pocock, not only did liberalism play no role in fostering the revolution, it was simply absent from the political discourse of the period.

Wood's *Creation* also reflected the conception that there are dominant paradigms, though his account was one of a paradigm shift. With its stress on the common good and sacrifice to the community, republicanism was the reigning ideology of the Revolution. The ideology, however, lost its intellectual coherence during the revolutionary era. As state legislatures took actions that aided some segments of society at the expense of others—such as paper money legislation and debtor stay laws, both of which aided debtors at the expense of creditors—political leaders began to reject the core republican ideas that there was a common good animating society and that the legislature could discern that good.²⁰⁷

199. Thomas Jefferson, Notes on the State of Virginia 165 (William Peden ed., 1954).

200. See Wood, *supra* note 195, at 179.

201. Letter from John Adams to James Sullivan (May 26, 1776), in 9 *The Works of John Adams* 375, 376–77 (Charles F. Adams ed., 1854).

202. See Wood, *supra* note 195, at 178–79.

203. See *id.* at 178.

204. See Rodgers, *supra* note 189, at 21.

205. See Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* 261 (1990) (criticizing view of dominance).

206. Pocock, *supra* note 193, at 507.

207. See Wood, *supra* note 69, at 396–403.

More recent work on political discourse during the revolutionary era and the early republic—including Wood's and Pocock's²⁰⁸—is more nuanced and, at least with respect to the time of the Constitution's ratification, breaks from the assumption of a dominant ideological paradigm. While historians are sharply divided on a host of interpretive matters concerning republicanism and liberalism in the revolutionary era and the first years of the early republic, there is now a near consensus that both republican and liberal ideas powerfully influenced American politics during the 1780s and 1790s.²⁰⁹ As historian Robert Shalhope has observed, "America did not make a neat or smooth march into modernity. Instead, liberal and classical [republican] ideas existed in constant tension."²¹⁰ Equally important, much recent historical work has contended that, at the time of the framing, relatively few, if any, politicians of note were purely liberal or purely republican. Rather, the framers typically drew on both paradigms. As the writings of historians such as Wood, McCoy,²¹¹ Jennifer Nedelsky,²¹² Lance Banning,²¹³ and Michael Lienesch²¹⁴ show, most of the framers continued to accept the quintessentially republican belief in the importance of (and the possibility of) the promotion of virtue by the state. As Professor Kramnick has observed:

208. Pocock observed, for example, in 1977: "[I]t is notorious that classical republicanism was . . . transformed in the making of the Federal Constitution and the Federalist and Republican minds." J.G.A. Pocock, Historical Introduction, in *The Political Works of James Harrington* 1, 147 (J.G.A. Pocock ed., 1977). On Wood, see *supra* note 195.

209. For example, both Professor Joyce Appleby, the leading proponent of the view that the Jeffersonians championed a liberal economic order, and Professor Lance Banning, the most prominent advocate of the view that republicanism powerfully influenced the Jeffersonians, agree that neither ideology was dominant at the time of the ratification of the Constitution nor the Bill of Rights. See Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 322–39 (1992); Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *Wm. & Mary Q.* 3, 12 (1986) [hereinafter Banning, *Jeffersonian Ideology Revisited*]; Lance Banning, *Quid Transit? Paradigms and Process in the Transformation of Republican Ideas*, 17 *Revs. in Am. Hist.* 199, 199–200 (1989) (reviewing Michael Lienesch, *New Order of the Ages* (1988)) [hereinafter Banning, *Quid Transit?*]. Other important recent works that recognize the influence of both ideologies include Michael Lienesch, *New Order of the Ages* 7–8 (1988); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 177–83 (1990); Wood, *supra* note 195, at 253–70; Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 *Wm. & Mary Q.* 3, 32 (1988); J.G.A. Pocock, *Communications*, 45 *Wm. & Mary Q.* 817, 817 (1988) (responding to Kramnick).

210. Robert E. Shalhope, *Republicanism and Early American Historiography*, 39 *Wm. & Mary Q.* 334, 350 (1982).

211. See Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 41–44 (1989); McCoy, *supra* note 198.

212. See Nedelsky, *supra* note 209.

213. See Banning, *Jeffersonian Ideology Revisited*, *supra* note 209; Banning, *Quid Transit?*, *supra* note 209.

214. See Lienesch, *supra* note 209.

Federalists and Antifederalists . . . tapped several languages of politics. . . . None dominated the field, and the use of one was compatible with the use of another by the same writer or speaker. There was a profusion and confusion of political tongues among the founders. They lived easily with that clatter; it is we, two hundred and more years later, who chafe at their inconsistency.²¹⁵

This scholarship indicates that Epstein's equation of Lockean ideology with the political thought behind the Takings Clause is incorrect. While it would be wrong to say that Locke had no influence on the founding generation, it is equally incorrect to describe Lockean liberalism as *the* ideology of the framing.

Revolutionary and early national era cases upholding uncompensated takings also suggest the continuing power of republican attitudes. The Pennsylvania Supreme Court, for example, denied a claim for reimbursement for goods seized as part of the war effort with the observation that "it is better to suffer a private mischief, than a public inconvenience."²¹⁶ In *M'Clenachan v. Curwin*,²¹⁷ that court rejected a claim for compensation on the grounds that citizens "were bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience."²¹⁸ In *Commonwealth v. Fisher*,²¹⁹ it observed that compensation was "a bounty given . . . by the state" for reasons of "kindness."²²⁰ In *Lindsay v. Commissioners*,²²¹ the South Carolina Attorney General proclaimed that the uncompensated taking of unimproved land was "one of the inherent prerogatives of the majesty of the people, and a power which the supreme authority of the state had a right to exercise, for the general good and convenience of the whole, and that it resulted from the very nature and ends of civil society."²²² An evenly divided court upheld the uncompensated taking as justified by "ancient rights and principles."²²³

Such comments and early compensation practices reflect a distinctly republican attitude towards property. It was a state creation and its scope was appropriately set by the state. As Benjamin Franklin put it, "Private Property . . . is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing

215. Kramnick, *supra* note 205, at 261.

216. *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (Pa. 1788).

217. 3 Yeates 362 (Pa. 1802).

218. *Id.* at 373.

219. 1 Pen. & W. 462 (Pa. 1830).

220. *Id.* at 465.

221. 2 S.C.L. (2 Bay) 38 (1796).

222. *Id.* at 50.

223. *Id.* at 57.

...²²⁴ Yet the fact that individual property claims could be curtailed did not evidence hostility to private property. As already discussed, republican ideology accorded the institution of private property a high degree of respect and protection because it provided the autonomy necessary for citizenship. In practice, republican attitudes toward property and rights meant that when property was taken, compensation was *usually* paid. The relevant republican decisionmaking body, normally a jury or the legislature, weighing the facts of the case would decide that compensation was consistent with the public good. But a resolution in favor of compensation was not inevitable. Thus, it could be decided (as it generally was) that in view of the community's need for cheap roads and the minimal burden imposed on an individual by building a road across that individual's unimproved property, no compensation would be paid. Because of faith in majoritarian decisionmakers, the early state constitutions did not contain substantive protections of property rights. They simply contained procedural protections—land could be taken only with the consent of the individual *or* of the legislature.

B. The Rise of the Just Compensation Requirement

The constitutionalization of the compensation requirement in the Massachusetts and Vermont constitutions and in the federal Bill of Rights and its incorporation in the Northwest Ordinance reflects a break from this republican tradition. In certain circumstances, compensation was now mandated and no longer a matter to be determined by majoritarian deliberations. It was, to use the terms set forth earlier, now a liberal right, existing outside of—and trumping—ongoing majoritarian deliberations. Thus, the story of the rise of the compensation requirement accords with historical accounts of revolutionary era ideology. As the revolutionary era progressed, people lost faith in legislatures and liberal ideas became increasingly prevalent.

At the same time, as previously discussed, the earliest clauses were narrow in scope: They applied only to physical takings.²²⁵ Thus, the early taking clauses did not represent a complete triumph for liberal attitudes. Again, the fact that the clauses applied only to physical takings squares with current historical accounts of the the ideology of the period. Just as revolutionary era ideology in general reflected both liberal and republican elements, there were now liberal and republican spheres with respect to property rights. The liberal sphere concerned physical takings, and here the obligation to compensate was absolute. The republican sphere concerned all other governmental actions affecting private prop-

224. Benjamin Franklin, *Queries and Remarks Respecting Alterations in the Constitution of Pennsylvania* (1789), in 10 *The Writings of Benjamin Franklin* 54, 59 (Albert H. Smyth ed., 1907).

225. See *supra* Part I.A.

erty: Here, the majority decided to what degree it wished to limit property claims and, if so, whether it wished to compensate.²²⁶

The foregoing discussion leads to certain crucial questions: Why was the line separating property interests that received substantive constitutional protections from those that did not drawn where it was? In other words, if there was a sphere in which majoritarian decisionmakers could limit property interests and a sphere in which they could not, why did possessory interests fall in the latter sphere? One possible explanation might be that the framing generation was limited to thinking of property in physicalist terms and thus saw only possessory interests as property. Their conception of property was not, however, so limited. As Professor Forrest McDonald has observed, "[T]he framers of the Constitution . . . understood that the word *property* had more meaning than one."²²⁷ While one such meaning equated property with physical possession (or, even more narrowly, land),²²⁸ in its traditional (and Lockean) sense, property meant "particular to, or appropriate to, an individual person."²²⁹ Blackstone's conception, while narrower than Locke's, was still

226. One wrinkle to this account should be added. The Northwest Ordinance of 1787 had a contract clause. See Northwest Ordinance of 1787, art. 2, reprinted in *Sources of Our Liberties*, supra note 12, at 392, 395. Thus, it, unlike the Massachusetts and Vermont constitutions, contained a second substantive limitation on governmental control over private property.

One final definitional point should be made: Republican and liberal attitudes towards compensation should not be viewed as polar opposites. Under both schools of thought, compensation was considered the norm. The republican school, however, believed that the ultimate decision of whether to compensate the affected individual was to be resolved by the ordinary political process; the liberal believed that the obligation to compensate existed outside of that process and could not be compromised by it. See Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273, 276 (1991) (noting "interdependency" of republican and liberal attitudes).

I have previously explained the rise of the compensation principle in revolutionary America and in the early republic as a product of the rise of liberalism. See Treanor, supra note 19, at 704-05. My treatment of the topic here is significantly different in a number of respects. Influenced by then-current historical scholarship, in the earlier piece, I saw republicanism and liberalism as polar opposites and the takings clauses, as well as Madison's thought, as purely liberal. As indicated in the previous section, subsequent historical scholarship has shown that the relationship between republicanism and liberalism was more subtle and that the thought of leading politicians, including Madison, reflected the influence of both schools of thought. This Article attempts to apply those insights to the takings context. In particular, the new historical work has led me to focus on why the takings clauses were limited to physical possession, and I argue that those limitations can best be understood as reflecting the republican idea that in a certain sphere the state should continue to control the definition of property interests.

227. McDonald, supra note 18, at 10.

228. See Stanley N. Katz, *Thomas Jefferson and the Right of Property in Revolutionary America*, 19 J.L. & Econ. 467, 473 (1976) ("'Property,' to Jefferson, meant 'land.'"); Vandeveld, supra note 89, at 325 (arguing that Blackstonian conception of property was physicalist and "prevalent at the founding of the nation").

229. McDonald, supra note 18, at 10; see also Locke, supra note 14, § 27 ("[E]very man has a *property* in his own *person* . . ."); see also David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37

broad, as well as remarkably modern: The individual's right of property "consists in the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land."²³⁰ The capacious quality of Blackstone's conception of property is suggested by the fact that Epstein warmly embraces it, hailing the "completeness, universality, and relevance" of Blackstone's definition.²³¹ In part because of the Financial Revolution of the early eighteenth century and the rise of marketable shares of the public debt,²³² well before the time of the American Revolution, intangible assets played a significant economic role and assets, whether tangible or intangible, were described as property.²³³ During the course of the debates about the Constitution, the word property was used in all these different senses by Madison and other Federalists.²³⁴ In sum, the narrow protections of the first takings clauses were not the product of the fact that people could only conceive of property as physical possession. To explain the narrow scope, the following subsections examine the first constitutions that mandated compensation. In each case, it appears that the just compensation requirement was inspired by the fear that the political process could not adequately protect physical possession of property.

1. *The Vermont Constitution.* — In the case of Vermont, whose 1777 constitution contained the first compensation requirement, it seems obvious why physical possession of property received special protection: Vermonters' experience had taught them that title to land needed substantive constitutional protection because the political process would not

Am. J. Leg. Hist. 464, 472 (1993) ("[In Locke's theory], '[p]roperty' was a general political term referring to all the personal and political rights of individuals."); Laura S. Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127, 132 (1990) (discussing Locke's conception of property and its influence on early American jurisprudence).

230. 1 Blackstone, *supra* note 15, at 134.

231. Epstein, *supra* note 8, at 23. In making this statement, Epstein is referring to the language quoted in the text, see text accompanying note 230, and to Blackstone's statement that the "right of property" is "that sole and despotic and dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." See 2 Blackstone, *supra* note 15, at *2; Epstein, *supra* note 8, at 22.

232. See Alexander, *supra* note 226, at 316–17.

233. See *id.* at 334.

234. Thus, Professor Nedelsky has observed:

Like most of their fellow Federalists, Madison and [Gouverneur] Morris rarely spelled out what they meant by "property;" the meaning varied according to context. Sometimes the word referred to the rights of property (as in the modern sense of a bundle of rights) Sometimes the word meant literally concrete property. . . . Sometimes it meant men of property. . . . But very often the word carried all these meanings. . . . When property was used in this sense, it connoted the intrinsic significance of the fundamental rights of man and his basic needs, the importance of security, of independence, and of superior power and influence.

Nedelsky, *supra* note 215, at 150–51; see also *infra* text accompanying notes 298–300 & note 298 (discussing Madison's conception of property).

always respect legitimate land titles. Indeed, the preamble to the Vermont Constitution—in which Vermonters declared their independence from New York, as well as Great Britain—reads like an apologia for the state's takings clause, for the principal theme of the preamble is that the New York government had unjustly invalidated the land grants held by Vermonters.

The land that subsequently became Vermont was originally part of the colony of New Hampshire and was primarily settled by individuals whose grants had issued from the New Hampshire government.²³⁵ In 1764, however, the English government transferred control of these territories to the New York colonial government, which subsequently refused to acknowledge the New Hampshire land grants. The preamble of the Vermont constitution of 1777 recounted the tale in detail. It stated:

[T]he late Lieutenant Governor Colden, of New-York, with others, did . . . covet those very lands; and by a false representation made to the court of Great Britain, (in the year 1764, that for the convenience of trade and administration of justice, the inhabitants were desirous of being annexed to that government,) obtained jurisdiction of those very identical lands *ex parte*; which ever was, and is, disagreeable to the inhabitants.²³⁶

The crown government of New York then “refused to make regrants of our lands to the original proprietors and occupants, unless at the exorbitant rate of 2300 dollars fees for each township; and did enhance the quit-rent, three fold, and demanded an immediate delivery of the title derived before, from New-Hampshire.”²³⁷ New York judges pronounced the New Hampshire land grants “utterly null and void.”²³⁸ When Vermonters refused to comply with the terms necessary to secure regrants, the colonial New York Legislature passed an act providing for a fine and imprisonment for anyone who refused to assist the sheriff in ousting those who held land under New Hampshire grants in favor of new grantees, and a series of acts empowering judges “to award execution of death against those inhabitants in said district, that they should judge to be offenders, without trial.”²³⁹

The preamble also reported that independence from Great Britain did not improve the situation in Vermont. The New York Convention of 1776 demanded for the new state government of New York the quit-rents that the crown government had asserted Vermonters owed.²⁴⁰ “[T]he legislature of New-York . . . still continue [*sic*] to disown the good people of this State,” the preamble complained, noting section thirty-six of the New York constitution, which recognized the validity of the land grants

235. See William Slade, *Vermont State Papers* xv, xvii (J.W. Copeland ed., 1823).

236. *Vt. Declaration of Rights* pmbl. (1777), reprinted in 1 Schwartz, *supra* note 14, at 319, 320 [hereinafter *Vt. Declaration*].

237. *Id.*

238. *Id.*

239. *Id.* at 321.

240. See *id.*

from the New York crown government.²⁴¹ The larger problem that New York's failure to recognize the land grants illustrated was that "the local situation of this State, from New-York, at the extreme part, is upward of four hundred and fifty miles from the seat of that government, which renders it extreme [sic] difficult to continue under the jurisdiction of said State."²⁴² In other words, because Vermont was far removed from the capital where decisions were made, its claims could not be fairly considered. As a result, it was "absolutely necessary" for Vermont to split away from New York and to become a separate state.²⁴³

Their experience with the government of New York led Vermonters to include in their constitution a series of rights, many of which were either novel or at least uncommon in the first state constitutions. Clause IV set forth Vermonters' exclusive right to govern themselves: "That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."²⁴⁴ Clause XIX had the effect of barring extradition to New York: "That no person shall be liable to be transported out of this State for trial, for any offence committed within this State."²⁴⁵ Clause XVII guaranteed the individual's and the community's right to exit from a polity: "That all people have a natural and inherent right to emigrate from one State to another, that will receive them; or to form a new State in vacant countries, or in such countries as they can purchase, whenever they think that thereby they can promote their own happiness."²⁴⁶ And Clause II provided: "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."²⁴⁷

Significantly, this last clause, the takings clause, was the only substantive protection for property rights in the Vermont constitution (as well as the first substantive protection for property rights in any of the state constitutions). In its historical context, this clause clearly does not represent a belief that legislatures, as a general matter, would not respect prop-

241. *Id.* at 320; see also N.Y. Const. of 1777, § 36, reprinted in 1 Schwartz, *supra* note 14, at 301, 311 (recognizing validity of New York land grants).

242. Vt. Declaration pmbl., *supra* note 236, at 321.

243. *Id.*; see also Charles T. Morrissey, *Vermont: A Bicentennial History* 89 (1981) (noting that local convention voted in 1777 to establish a separate state). Vermont was not, however, admitted to the United States until 1791. See *id.* at 100. The Vermonters' concern that distance made adequate representation impossible was one that others in the revolutionary era shared. In particular, Anti-federalists argued that, because the national government would be physically distant from most of its constituents, Congress would not be able to learn about what citizens at any given time wanted and the people would have difficulty monitoring Congress. Distance would therefore weaken faith in government. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1137-45 (1991).

244. Vt. Declaration ch. I, cl. IV, *supra* note 236, at 322.

245. *Id.* cl. XIX, at 324.

246. *Id.* cl. XVII.

247. *Id.* cl. II, at 322.

erty claims. Rather, it protects the one property interest that Vermonters' experience had showed them was peculiarly unlikely to receive fair consideration in the political process: the real property interests of people who lived in a region distant from the state government and who were a small part of the polity's populace. Because Vermonters were a small and powerless minority in New York politics, their claims had been disregarded in revolutionary era majoritarian deliberations (as well as in colonial legislative decisions). The property interest most at risk when the people of a region were a political minority was the property interest that defined them: their land claim in that region. As a result of their vulnerability, Vermonters' land claims had been invalidated and their land had reverted to the state, which had regranted it. The Vermont Takings Clause was thus designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone.

2. *The Massachusetts Constitution of 1780 and the Northwest Ordinance of 1787.* — The process that led to the passage of the next just compensation clause, contained in the Massachusetts Constitution of 1780, is less clear. In 1778, a proposed state constitution had been rejected, largely on the grounds that it did not adequately safeguard the rights of property.²⁴⁸ The various Massachusetts town meetings that rejected the 1778 Constitution called for protection of property rights through institutional mechanisms, such as property qualifications for voters and state office holders; apparently, none mentioned a desire for a just compensation requirement.²⁴⁹ Responding to this concern, the framers of the 1780 constitution established such property qualifications.²⁵⁰ But they also included a takings clause: "[W]henever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."²⁵¹ It is not clear why this takings clause was included, given the apparent lack of demand for such a clause. Perhaps, as the framers of the constitution cast about for devices to protect property, they decided to emulate the one substantive protection already recognized in a state constitution, the takings clause of neighboring Vermont.²⁵² If this is the case, it is possible that the

248. See *The Popular Sources of Political Authority* 22 (Oscar Handlin & Mary Handlin eds., 1966).

249. For the texts of the various town responses, see *id.* at 202-379.

250. For a comparison of the property qualifications in the draft 1778 constitution and the 1780 constitution, see Willi P. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 295 (Rita Kimber & Robert Kimber trans., 1980).

251. Mass. Const. of 1780, art. X, reprinted in 1 Schwartz, *supra* note 14, at 342.

252. My research has uncovered only one other relevant piece of evidence. In 1784, one Massachusetts citizen complained that, both before and after the adoption of the 1780 constitution, Massachusetts juries denied compensation to land owners whose property was taken for roads by determining that the benefits from the roads more than offset the value of the land taken; he claimed that such actions were invalid under the 1780 constitution. See Jonathan Parsons, *A Consideration of Some Unconstitutional Measures, Adopted and*

Massachusetts framers were simply copying someone else's handiwork without reconsidering the lines that the Vermont constitution established between the permissible and the impermissible.

Consideration of the next compensation clause, the Northwest Ordinance of 1787, however, suggests an alternate understanding of the Massachusetts history. The Northwest Ordinance provides: "[S]hould the public exigencies make it necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same. . . ." ²⁵³ The language of the Northwest Ordinance—and in particular the words "public exigencies" and "common preservation"—suggests that the clause was designed to require compensation when goods were seized by the military. Both phrases seem to refer not to ordinary takings of property for roads and the like, but rather to seizures effected out of compelling need to preserve the polity itself. One early Court interpreted the Northwest Ordinance in this fashion. "The words common preservation," the Louisiana Supreme Court declared in 1816, "imply that Congress had then in view those extraordinary cases, in time of war or danger, when the property or services of an individual become accidentally necessary to the preservation of the country" ²⁵⁴

Uncompensated seizures by the military had been a source of concern during the revolutionary era. John Jay in 1778, for example, publicly denounced "*the Practice of impressing Horses, Teams, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land.*" ²⁵⁵ Similarly, as has already been noted, St. George Tucker, in explaining in 1803 why the Fifth Amendment's Takings Clause had been added to the federal Constitution, observed that the clause "was probably intended to restrain the arbitrary and op-

Practiced in This State 17–22 (Newbury-port, Mass. 1784). If Parsons's view were widely held, the takings clause arguably reflected broad discontent with the way in which juries awarded compensation for lands used in road building. But if this were a broadly held concern, it would presumably have shown up in the town resolves responding to the 1778 proposed constitution. Since it did not, it seems that the framers may simply have copied the Vermont constitution because it provided a model.

Another possible and related explanation for the takings clause is that the framers of the Massachusetts constitution, seeking a model for protection of property, used either chapter 8 of the Massachusetts Body of Liberties or Article 28 of Magna Carta. Both documents, however, only protected personal property, unlike the Vermont constitution and unlike the 1780 Massachusetts constitution. See *supra* note 12 and accompanying text. Thus, the Vermont constitution offered the more likely model. It may, however, be the case that the presence of similar clauses in Magna Carta and the Body of Liberties affected the framers of the Massachusetts constitution as they decided whether or not the presence of a takings clause was appropriate.

253. Northwest Ordinance of 1787, art. 2, reprinted in *Sources of Our Liberties*, *supra* note 12, at 392, 395.

254. *Renthorp v. Bourg*, 4 Mart. 97, 132 (1816).

255. John Jay, A Freeholder, A Hint to the Legislature of the State of New York (Winter 1778), in 5 *The Founders' Constitution* 312, 312 (Philip B. Kurland & Ralph Lerner eds., 1987).

pressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war."²⁵⁶ In at least one court case, an individual whose property was seized by military authorities sued, only to have the claim denied on the grounds that no right to compensation existed.²⁵⁷

The Northwest Ordinance may provide a helpful gloss to the Massachusetts Constitution because one of the members of the congressional committee that drafted the compensation clause of the Northwest Ordinance—indeed, the committee member who handwrote the draft of the ordinance in which the clause appeared for the first time—was Massachusetts Congressman Nathan Dane.²⁵⁸ In an 1830 letter Dane stated, "The Ordinance of '87 was framed mainly from the laws of Massachusetts."²⁵⁹ This suggests that, if the Northwest Ordinance was concerned with requiring compensation when the military seized goods, as the language of the clause suggests, the same may have been true of the Massachusetts Constitution of 1780. If so, the Ordinance merely made explicit what was implicit in the state constitution. Under this reading, both takings clauses addressed a particular problem beyond the direct control of the political process—the seizure of goods by a military acting on its own authority and without the sanction of political decisionmakers. This is a very different kind of process failure than the one the Vermont framers sought to redress, but it is nonetheless a process failure. If this reading is correct, none of the three revolutionary era takings clauses reflected a broad belief that legislatures would not fairly consider property rights. Rather, each embodied the belief that there was a small class of cases in which property concerns would not be fairly considered, and that a compensation rule was necessary for that class.

There are two other possible explanations for the presence of a takings clause in the Northwest Ordinance,²⁶⁰ and it is possible that all three played a part in the clause's inclusion in the document. The first is that the clause may have reflected a broad concern on the part of some congressmen that the territorial legislature would not adequately respect private property rights. Clearly, at least one congressman had such a concern prior to the enactment of the Ordinance, and he was satisfied by the Ordinance. The congressman was Virginia's Richard Henry Lee, who wrote Washington about the Ordinance: "It seemed necessary, for the security of property among uninformed, and perhaps licentious people, as the greater part of those who go there are, that a strong toned govern-

256. 1 Tucker, *supra* note 41, at 305–06.

257. See *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362–63 (Pa. 1788).

258. See 1 Schwartz, *supra* note 14, at 385.

259. *Id.* at 386.

260. These two explanations parallel Professor Benjamin Wright's explanation of the presence of a contract clause in the document. See Benjamin F. Wright, Jr., *The Contract Clause of the Constitution* 6–7 (1938).

ment should exist, and the rights of property be clearly defined.”²⁶¹ The Ordinance contained two provisions providing substantive protection for property rights; in addition to the takings clause, it contained the first contract clause.²⁶² Clearly, Lee was referring to the contract clause,²⁶³ and he may have been referring to the takings clause as well. If (contrary to my previous argument) one sees the Northwest Ordinance’s takings clause as applicable to all physical takings (rather than just seizures by the military), then, taken together, the contract clause and the takings clause limited an entire range of legislative actions concerning property, not just one particular type of legislative action. However, Lee’s letter reflects not a generalized distrust of legislatures, but rather a distrust of territorial legislatures. He was anxious about the territorial legislature because “the greater part of those who go there [the territories]” are “uninformed, and perhaps licentious people.”

It is also possible that the clause was designed to prevent the territorial legislature from revoking the Ohio Company’s land grant. At the time that the Northwest Ordinance was enacted, the Ohio Company, an association composed of former soldiers and officers from Massachusetts, was seeking to obtain from Congress 1.5 million acres of the Northwest Territories on terms that were remarkably favorable to the company.²⁶⁴ A number of historians have suggested that the company’s lobbyist, Manasseh Cutler wrote and engineered the passage of the contract clause in order to protect the grant that the company received shortly thereafter.²⁶⁵ The takings clause appeared for the first time in the draft of the Northwest Ordinance that also introduced the contract clause.²⁶⁶ Conceivably, Cutler might have also written the takings clause, and for the same reason. If this were the case, however, the clause would have been written to remedy another kind of process failure: a legislature’s singling out an entity that was disadvantaged in the political process, since it was principally owned by stockholders who lived outside of the Northwest Territories and hence were unrepresented in its legislature. Article 4 of the Ordinance provides further support for the view that the document’s framers were concerned about process failure. It provides that “in no

261. Letter from Richard Henry Lee to George Washington (July 15, 1787), in 2 *The Letters of Richard Henry Lee 1779–1794*, at 425, 425 (James C. Ballagh ed., 1914).

262. See Wright, *supra* note 260, at 6–7.

263. See *id.*

264. See Paul W. Gates, *History of Public Land Law Development* 70 (1979); Merrill Jensen, *The New Nation: A History of the United States During The Confederation 1781–1789*, at 355–56 (1950). After the enactment of the Ordinance, the Ohio Company was able to obtain its grant at a cost in specie of approximately eight cents an acre. See Gates, *supra*, at 70.

265. See Wright, *supra* note 260, at 7 n.10 (listing sources).

266. See July 11, 1787, Draft of Northwest Ordinance, reprinted in 1 Schwartz, *supra* note 14, at 391, 395.

case shall non-resident proprietors be taxed higher than residents.”²⁶⁷ This article illustrates the recognition of the vulnerability of those who lacked the vote and whose voice was weakened by distance.

In short, the bulk of the evidence concerning the predecessor clauses to the Fifth Amendment’s Takings Clause suggests that these clauses were *not* written out of a belief that legislatures could not be trusted to protect property rights. Rather, the evidence—with the exception of Lee’s letter—reflects a belief that constitutionalization of the compensation issue was seen as necessary to address those isolated instances in which the political process would not adequately protect property rights. The reasons for the failure of process varied, as did the type of physical property perceived to be at risk. But the overall purpose of the clauses and the perceived vulnerability of physical property remained constant.

3. *The Fifth Amendment’s Takings Clause.* — The framing of the Fifth Amendment’s Takings Clause gives rise to similar observations. Aside from Madison,²⁶⁸ there was remarkably little desire for any kind of substantive protection of property rights against the national government. Indeed, none of the state ratifying conventions requested a just compensation clause or a contract clause binding on the federal government.²⁶⁹ The Constitution already limited the national government’s exercise of power concerning property rights: Export duties and taxation on interstate commerce were banned; the slave trade protected until 1808; direct taxes restricted; preferential treatment of ports, bills of attainder, ex post facto laws, and corruption of the blood prohibited.²⁷⁰ Some of the constitutional protections of private property—like the bans on bills of attainder and retrospective laws—can be understood as designed to address the limited range of cases in which structural protections would not adequately protect against singling out.²⁷¹ Nonetheless, the national government’s power to act in ways that would affect the distribution of wealth was clear. Any taxes the national government imposed or trade policy it pursued would have enormous consequences. The Constitution explicitly barred the states not only from impairing contracts, but from coining money, issuing bills of credit, and making anything but gold or silver coin legal tender; the federal government was not so limited.²⁷²

267. Northwest Ordinance of 1787 art. 4, reprinted in *Sources of Our Liberties*, supra note 12, at 392, 396.

268. For a full discussion of Madison’s views on this point, see *infra* Part III.C.

269. For a compilation of the various proposals, see Dumbauld, supra note 51, at 161–65.

270. See U.S. Const. art. I, § 9; *id.* art. III, § 3; McDonald, supra note 18, at 268–70.

271. See Steven G. Calabresi, Note, A Madisonian Interpretation of the Equal Protection Doctrine, 91 Yale L.J. 1403, 1425–26 & n.87 (1982). Calabresi makes a similar suggestion concerning the Takings Clause. See *id.* at 1425–26.

272. See U.S. Const. art. I, § 10; McDonald, supra note 18, at 270.

Those concerned with the protection of property presumably found convincing the argument that Madison advanced in *Federalist* Ten²⁷³ and believed that the structure of the national government that the Constitution established adequately protected property interests. Thus, there was no need for a clause barring the federal government from interfering with contracts because the institutional structures adequately protected the underlying property interests.

Indeed, the absence of demand for a takings clause indicates that other national political actors had greater faith than Madison that the national government would act in a way consistent with property rights. In fact, an Anti-federalist complaint was that the national government would likely treat property rights with *too much* respect. For example, an anonymous 1787 tract, written in the form of a catechism, contained the following lesson as part of its critique of the Constitution:

Q. What ought to be the object of government?

A. The welfare of the governed.

Q. How is such a government to be obtained?

A. By forming a constitution which regards men more than things.²⁷⁴

Why, then, was Madison's takings clause ratified, if there was so little demand for it? Why not just trust the national government to pay compensation when appropriate? Madison's rationale will be developed in the next section, and presumably others favored the clause for similar reasons. In addition, although they had not sought its inclusion as an amendment, some federalists thought that there was a natural right to compensation.²⁷⁵ It would appear likely that, for some Anti-federalists suspicious of the power of the central government, any limitation was desirable.

But the best piece of evidence explaining why most people initially favored the clause is St. George Tucker's previously quoted statement that the clause was ratified in order to insure compensation when there was military impressment of personal property.²⁷⁶ Tucker's comment ap-

273. See *infra* Part III.C (discussing *The Federalist* No. 10).

274. Michael Kammen, *The Rights of Property, and the Property in Rights, in Liberty, Property, and the Foundations of the American Constitution* 1, 10 (Ellen F. Paul & Howard Dickman eds., 1989) (quoting catechism).

275. The strongest early statement of such a position is Justice Patterson's decision in *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795). The case held that Pennsylvania could not take land from one citizen and vest it in another, but the language indicates that Patterson believed that natural law barred an uncompensated taking by the government of an individual's land. He observed:

The legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government . . .

Id. at 310.

276. See *supra* text accompanying note 256.

pears to be the only more or less contemporaneous statement of why the clause was passed. Moreover, Tucker was in a good position to make such a judgment. He was a prominent Virginia jurist, politician, legal educator and lawyer, and a friend of Jefferson. He was one of Virginia's representatives at the Annapolis convention that issued the call for the federal constitutional convention, and the author of the most prominent constitutional law treatise in the early republic.²⁷⁷

Tucker suggested that the clause was ratified in order to insure compensation when there was military impressment of personal property. As previously pointed out, concern with impressment without compensation is not the same thing as a general concern that government will not adequately protect property rights. It reflects, instead, a belief that compensation must be constitutionally mandated in a small category of cases in which the normal safeguards of the political process are absent. Here, safeguards were absent because the military was engaging in unsanctioned and forcible acts of confiscation. Unchecked by political decisionmakers who because of distance could not effectively monitor the military's actions, the military was free to single out individuals and take their property without providing redress.²⁷⁸ Presumably, few saw this as a critical problem. If the problem had been a source of widespread concern, at least one state would have proposed a constitutional amendment to redress it. Nonetheless, once Madison had proposed an amendment that was seen as addressing this problem, it won support.

In short, the proponents of the various compensation requirements for the most part acted from a desire to protect property in those particular cases in which majoritarian decisionmaking processes would not fairly consider the claims of the owner. The original understanding did not reflect a broad belief that majoritarian decisionmakers would subvert property. It reflected, instead, a narrower concern with process failure.

C. *James Madison and the Just Compensation Requirement*

This section explores Madison's conception of the Takings Clause, which is significant because of his prominent role in its promulgation. Moreover, his extensive writings reflect a sophisticated view of the potential threats of majoritarian decisionmaking and the appropriate protections for private property. The republican and liberal elements evident in Madison's political philosophy help to explain his view of the appropriate scope of protection for certain property interests. Properly understood, Madison's views support an originalist reading of the Takings

277. See Charles T. Cullen, *St. George Tucker and Law in Virginia, 1772-1804*, at 186-89 (1987); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. Pa. L. Rev. 491, 520-21 (1994).

278. See McConnell, *supra* note 153, at 292 (suggesting that because of high monitoring costs, a self-interested military had been free to seize goods during the Revolutionary War and that the Takings Clause responded to this problem).

Clause that recognizes strong concern with protecting against failures in the political process.

1. *The Two-Tiered Protection of Madison's Takings Clause.*— Madison's speech proposing the Bill of Rights offers the first guide to understanding why he crafted the clause in the way he did. In this speech, he offered two separate arguments for the Bill of Rights. First, it would establish enforceable rules: "[I]ndependent tribunals of justice," he declared, "will consider themselves in a peculiar manner guardians of those rights" ²⁷⁹ Second, it would serve an educative role: "[P]aper barriers have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community" ²⁸⁰ The Bill of Rights would therefore advance both the liberal end of protecting certain interests from the political process and the republican end of informing majoritarian deliberations. In presenting his Bill of Rights to Congress, Madison did not detail what the Takings Clause meant. But the way in which he understood the clause accords with these two general ends.

The liberal end of the clause established a rule of law barring the federal government from physically taking real or chattel property, including slaves, without compensation. Madison's statements that directly concern the meaning of the Takings Clause are limited in number, but they consistently reflect the view that the clause only mandated compensation when property was physically taken from the owner. When he proposed his draft Bill of Rights to Congress, the Takings Clause he offered was clearly limited in this way: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." ²⁸¹

Moreover, Madison's 1792 essay *Property*, in which he criticized the economic program proposed by Secretary of Treasury Alexander Hamilton, indicates that he also understood the legal import of the clause as adopted to be that compensation was required only for physical takings. Hamilton had proposed a series of measures designed to promote manufacturing and investment interests, and Madison had opposed them. In 1790, for example, Hamilton had successfully urged that when the federal government paid off debts incurred by the Continental Congress, it should pay the current holders of the notes. Madison opposed the plan because it aided speculators; he preferred to split the federal government's payments between the original and current note holders. ²⁸² Shortly before Madison wrote *Property*, Hamilton issued his Report

279. James Madison, Amendments to the Constitution (June 8, 1789), in 12 The Papers of James Madison 197, 207 (Charles F. Hobson et al. eds., 1979) [hereinafter Madison Papers]; see also Bernard Schwartz, *Great Rights of Mankind* 200 (1977) (arguing that Madison intended rights embodied in Bill of Rights to be enforceable in the courts).

280. Madison, *supra* note 279, at 204–05.

281. *Id.* at 201.

282. See Elkins & McKittrick, *supra* note 194, at 143–44.

on the Subject of Manufactures, which called for a series of tariffs and bounties to encourage the manufacture of certain products; Madison was sharply critical.²⁸³ *Property* was one of the series of essays that Madison published in the *National Gazette* newspaper in response to Hamilton's economic program,²⁸⁴ and the essay should be understood against that background. The essay criticizes restrictive economic regulations:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.²⁸⁵

It then criticizes "unequal taxes":

A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.²⁸⁶

To combat these evils Madison then invokes the Takings Clause of the Fifth Amendment:

If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.²⁸⁷

The quoted language indicates that, as a rule of law, the Takings Clause has a narrow meaning. The reference to the governmental provision "that none shall be taken *directly* even for public use without indemnification to the owner" is a clear reference to the language of the clause. By

283. See *id.* at 258–66.

284. See *id.* at 266; Ralph Ketcham, *James Madison, A Biography* 330 (1971).

285. James Madison, *Property*, *Nat'l Gazette*, Mar. 27, 1792, in 14 *The Papers of James Madison* 266, 267 (Robert A. Rutland et al. eds., 1983) [hereinafter *Madison, Property*].

286. *Id.*

287. *Id.* at 267–68.

contrasting these governmental actions with those that follow, Madison clarified by process of exclusion the class of governmental actions for which he believed that compensation was required. In other words, compensation is *not* mandated for "indirect[] violations" of property. The contrast suggests that compensation is mandated for physical takings—"direct[]" violations—not regulations—"indirect[]" violations. To put this quote in context: Madison is arguing that Hamilton's program is not barred by the rule of law established by the Takings Clause, but that it is inconsistent with the principle for which the clause stands.²⁸⁸

Madison's other significant discussion of the compensation requirement occurred in 1819, after he had retired from the presidency, in a private letter to slavery opponent Robert Evans. This letter, in which Madison laid out his plan for the United States government to purchase all slaves, using the proceeds from the sale of public lands, and then transport the freed slaves to Africa, also reflects the view that the clause mandated compensation when property was physically taken from the owner. Madison wrote that any program for emancipation would have to include "a provision in the plan for compensating a loss of what [the slaveowner] held as property guaranteed by the laws, and recognised by the Constitution."²⁸⁹ Expanding on this point, he argued that, because of the Takings Clause, the "portion of the nation which . . . has no interest in slave property" would not oppose compensation.²⁹⁰

They [the non-owning part of the nation] are too just to wish that a partial sacrifice should be made for the general good; and too well aware that whatever may be the intrinsic character of that description of property [slaves], it is one known to the constitution, and, as such could not be constitutionally taken away without just compensation.²⁹¹

Thus, because the clause mandated compensation when the government physically took property from the owner, it required compensation for abolition.²⁹²

288. The interpretation of *Property* advanced here elaborates on that in Treanor, *supra* note 19, at 712–13.

289. Letter from James Madison to Robert Evans (June 15, 1819), in *The Mind of the Founder: Sources of the Political Thought of James Madison* 315 (Marvin Meyers ed., 1981) [hereinafter *Mind of the Founder*].

290. *Id.* at 318.

291. *Id.*

292. Madison's belief that the Takings Clause required compensation in the event of abolition was the consensus view prior to 1830 and the dominant view throughout the antebellum era. See *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14, 445); *In re Perkins*, 2 Cal. 424, 429, 443 (1852) (Anderson, J.); Gary Nash, *Race and Revolution* 36 (1990). One aspect of this view of the Takings Clause worth noting is that compensation is owed even though the "property" "taken" is not thereafter used by the government. In other words, compensation is owed even though slaves are freed, rather than impressed into government service. This conception of the meaning of the Takings Clause is of particular significance to current debates about its meaning because it is at odds with Professor Jed Rubenfeld's recent suggestion, which he defends in part on

The republican end of the clause was that it embodied a broader principle of governmental respect for private property, a principle that could be appealed to in majoritarian debates. *Property* is an example of such an appeal. Madison attacked Hamilton's economic program by arguing that "unequal taxes [that] oppress one species of property and reward another species"²⁹³ and "arbitrary restrictions, exemptions, and monopolies"²⁹⁴ were inconsistent with the principle underlying the Takings Clause: A nation that enacted a Takings Clause should also shun governmental actions that "indirectly violate[] [citizens'] property." Implicit in the fact that Madison did not claim direct constitutional violations is his belief that the Takings Clause did not prevent the national government from using its taxing and regulatory powers to affect the distribution of wealth, as he believed Hamilton's policies would do. The only protection against such policies lay in the political process. At the same time, he believed that the Takings Clause, despite its narrow legal significance, could influence that process by educating citizens about the sanctity of property. It was a statement of national principle.

It should be added that the Takings Clause proved immensely influential in this regard. In particular, it influenced state court decisions to impose a compensation requirement on state actions in the absence of state takings provisions.²⁹⁵ By 1868, every state but North Carolina had a takings clause in its state constitution.²⁹⁶ And, although there were obviously other factors at work, Madison's goal in writing *Property* was achieved: Congress did not adopt the proposals set forth in Hamilton's Report on Manufactures.²⁹⁷

2. *The Limited Protection of Property Interests in General.* — If Madison understood the clause to apply only to physical takings, the question again becomes: Why did he go this far and no further? Madison's concern with the protection of private property interests is well known and one of the central tenets of his political theory. The republican appeal of

historical grounds, that "a taking for public use . . . can occur only when some productive attribute or capacity of private property is exploited for state-dictated service." Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1114-15 (1993).

293. Madison, *Property*, supra note 285, at 267.

294. *Id.*

295. This point is developed in Treanor, supra note 19, at 714-15; see also Grant, supra note 178, at 71 ("federal bill of rights [not] without value as authority" for state courts establishing compensation requirement in absence of constitutional provision).

296. See Julius L. Sackman, *Nichols' The Law of Eminent Domain* 1.80-83 (3d ed. 1995) (listing state constitutional provision).

297. See Elkins & McKittrick, supra note 194, at 270-71. Among the other factors were the defeat of St. Clair's army by Native Americans and the panic of 1792. See *id.*

For a discussion of the instructional aspect of the Takings Clause, see Treanor, supra note 19, at 714-16; Harry N. Scheiber, *The "Takings" Clause and the Fifth Amendment: Original Intent and Significance in American Legal Development*, in *The Bill of Rights: Original Meaning and Current Understanding* 233, 235 (Eugene W. Hickock, Jr. ed., 1991); see also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1205-12 (1992) (describing educative function of constitutional provisions).

Property signifies his commitment to that principle. Why, then, did he not write the clause more broadly or propose some other means to protect private property from the federal government? Why did he satisfy himself with a clause that, with respect to many property interests, was merely hortatory? The answer here is very clearly *not* that Madison failed to see the close relations between the physical seizure of property (which required compensation) and other state actions that affected property (where the only remedy was political). With a very broad sense of property, Madison was acutely aware of that connection and, in fact, made it explicitly. *Property* illustrates this point, arguing against Hamilton's economic program on the grounds that it was inconsistent with the principle embedded in the Takings Clause.²⁹⁸ Similarly, in 1786, he argued in the Virginia Legislature against the issuance of paper money on the grounds that it "affects rights of property as much as taking away equal value in land."²⁹⁹ As Professor Nedelsky has written:

Madison did not . . . have a simple conception of property as land or even material goods. The "faculties of acquiring property" [the protection of which was, according to Federalist Ten, the first object of government] emphasized a subtle, non-material dimension of property. And the legislative injustice he feared was not straightforward confiscation, but the more indirect infringements inherent in paper money and debtor relief law. . . . Madison's concept of property thus had a modern, sophisticated quality that went far beyond the focus on land that we associate with the traditional image of the yeoman farmer.³⁰⁰

While Madison never explained why he believed the limited scope of the Takings Clause was appropriate, his overall governmental philosophy suggests several reasons. Madison believed that governmental actions could properly (and in fact inevitably) affect the value of people's property, and that, as a general matter, the checks and balances provided by

298. In fact, *Property* reflects a view of property that is broader than the notion of property as value. Madison explicitly contrasted a notion of property as dominion, pursuant to which "a man's land, or merchandize, or money is called his property," with a "larger and juster [definition that] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*." Madison, *Property*, supra note 285, at 266. He summarized the distinction as follows: "In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights." Id. For further discussion, see Kammen, supra note 274, at 10-13; see also Underkuffler, supra note 229, at 135-38 (discussing implications of essay's conception of property in rights); supra note 234 (quoting Nedelsky on different ways in which Madison and other Federalists used the word "property," including "in the modern sense of a bundle of rights"); see generally notes 227-234 and accompanying text (discussing definitions of property available to framers).

299. James Madison, Notes for Speech Opposing Paper Money (Nov. 1, 1786), in *9 The Papers of James Madison* 158 (Robert A. Rutland et al. eds., 1975).

300. Nedelsky, supra note 209, at 30. While I agree with Professor Nedelsky's statement that Madison feared "indirect infringements" by the legislature of property rights, I disagree with her belief that he was not concerned about direct confiscation. See *infra* text accompanying notes 331-355.

the federal system's political process adequately protected property interests.

Federalist Ten directly evidences these themes. Madison wrote: [T]he most common and durable source of factions has been the various [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. *The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of government.*³⁰¹

Thus, divisions based on competing property interests are the principal cause of faction, and civilization inevitably produces new divisions. The legislative process necessarily involves determinations that aid the interests of one group and hurt those of another. Laws "concerning private debts" will either help creditors or debtors.³⁰² The "manufacturing classes" will seek governmental subsidies for themselves and "restrictions on foreign manufacturers"; the landed interest will oppose both types of measures.³⁰³ The nature of government is to create winners and losers. Self-interested people will disagree about who should win and who should lose. "Yet," Madison observed, "the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail."³⁰⁴

Moreover, Federalist Ten argues that the system of governance set forth in the Constitution will allow for wise selection between competing interests. Property will be better protected at the national level than at the state level. The size of the country served to protect the rights of property, because "[l]arge districts are manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theatre."³⁰⁵ The size of the country also served to protect property rights because it affected coalition building:

Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other

301. The Federalist No. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

302. Id. at 79-80.

303. Id. at 80.

304. Id.

305. James Madison, Note to his Speech on the Right of Suffrage (1821), in 3 Farrand, *supra* note 197, at 450, 454 [hereinafter Madison, Right of Suffrage].

citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.³⁰⁶

Because national representatives would be more respectable than state representatives and because of the "exten[sion] of the sphere," protections that were necessary against the state were not required for the federal government. To make his point, Madison offered hypothetical invasions of property interests:

A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.³⁰⁷

Implicitly, the last point is Madison's explanation of why a contract clause may be needed against the states (where a campaign for "the abolition of debts" might succeed), but not against the national government. Because the small size of a state permits domination by a faction, a contract clause might be necessary to bar state governments from unjustly interfering with private contracts. But the same was not true of the nation. The institutional structure established by the federal constitution meant that property rights were safeguarded.³⁰⁸

In short, for our purposes Federalist Ten makes two points. The first is that there is no way to escape the fact that governing involves choice, and as a result benefits some and hurts others. The second is that there is no need for special heightened protection of property interests against the federal government because there are already adequate structural protections for those interests.

Federalist Ten's acceptance of the fact that the governmental actions affect—and in some cases diminish—private property interests, was not anomalous. Professor Jennifer Nedelsky has recently summarized

306. The Federalist No. 10, *supra* note 301, at 83.

307. *Id.* at 84.

308. See McConnell, *supra* note 153, at 288–93. All of these arguments, of course, also suggest that Madison would have liked the Takings Clause to have regulated state, as well as federal, actions. As a practical matter, however, Madison could not achieve this end directly. The movement to secure a bill of rights came from Anti-federalists who wanted to limit the national government's power. Madison's proposal to include in the Bill of Rights an amendment preventing the states from infringing freedom of the press and freedom of conscience and from denying jury trials was defeated by the Senate. See Editor's Note, *in* 2 Schwartz, *supra* note 14, at 1053. Presumably, an attempt to make a takings requirement—a fairly novel right—binding against the states would have met with a similar fate. Since Madison only proposed amendments that he thought the Anti-federalists would not oppose, see Letter from James Madison to Samuel Johnson (June 21, 1789), *in* 12 The Papers of James Madison, *supra* note 279, at 249, 250, it seems that for political reasons he did not try to extend the Takings Clause to the states and trusted that the educative aspect of the clause would ultimately serve the same end. See Treanor, *supra* note 19, at 710–11 n.92.

Madisonian thought on the relation between property and governance in the following way: "Tax policies and economic regulation might have some redistributive consequences, but it should not be their *objective* to benefit some at the expense of others."³⁰⁹ Thus, Madison did not want a compensation requirement that would extend to any government action that affected the value of property. He believed that government, in pursuit of the commonweal, necessarily employed tax policies and regulations that consequentially hurt some economic interests. For example, he favored protective tariffs that fostered infant industries, even though such tariffs increased the costs of goods.³¹⁰ Indeed, while he believed it necessary as a restraint on factionalism in the states, Madison saw that even the Contract Clause, with its flat prohibition on interference with contracts, would sometimes have undesirable consequences. As he informed the convention, "[I]nconveniences might arise from such a prohibition"³¹¹

At times in his career, however, Madison appears to have moved beyond the position that redistributive consequences were a normal consequence of governmental actions, and to have favored government actions that had redistributive *objects*, if that redistribution accorded with republican ends. These positions suggest an alternative view of Madison's philosophy, one even more strongly opposed to the creation of a compensation requirement for regulations.

One example is his 1786 response to a letter he received from Thomas Jefferson during the latter's tenure as minister to France. Jefferson's letter was probably the most radical document of his career, and certainly his most radical statement about property.³¹² The tremendous wealth of the nobility and the poverty of the French peasantry led Jefferson to conclude that redistributive taxes were appropriate under certain circumstances, and he suggested that even confiscation might be appropriate if it were necessary to furnish all citizens with a minimum level of property. He wrote:

I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking

309. Nedelsky, *supra* note 209, at 31.

310. See James Madison, *Import and Tonnage Duties* (Apr. 9, 1789), in 12 *The Papers of James Madison*, *supra* note 277, at 69, 71-72 (observing that "commercial shackles are generally unjust, oppressive and impolitic," but that imposition of protective tariffs is appropriate in some cases because "[t]here may be some manufactures, which . . . for want of the fostering hand of government will be unable to go on at all"); Ketcham, *supra* note 284, at 280, 602-03 (noting Madison's support for protective tariffs as Secretary of State and President).

311. Remarks of James Madison (debate of Aug. 28, 1787), in 2 *Farrand*, *supra* note 197, at 437, 440.

312. See Katz, *supra* note 228, at 480-81.

care to let their subdivisions go hand in hand with the natural affections of the human mind. The descent of property of every kind therefore to all the children, or to all the brothers and sisters, or other relations in equal degree is a politic measure, and a practicable one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point, and to tax the higher portions of property in geometrical progression as they rise. . . . It is too soon yet in our country to say that every man who cannot find employment but who can find uncultivated land, shall be at liberty to cultivate it, paying a moderate rent. But it is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small landholders are the most precious part of a state.³¹³

Madison did not take issue with Jefferson's progressive taxation scheme, showing that, on the eve of the constitutional convention, "[h]e saw no violation of property rights in taxation rising geometrically upon great fortunes,"³¹⁴ to quote Irving Brant, Madison's preeminent biographer. He did express practical concerns with Jefferson's redistributive proposals. In particular, he suggested that redistribution of wealth was not a complete answer to the problem of European poverty: In Europe, there was not enough land for everyone, and more equitable distribution of agricultural property would hurt those who were engaged in nonagricultural occupations.³¹⁵ Overall, however, his response was positive: "I have no doubt that the misery of the lower classes will be found to abate wherever the Government assumes a freer aspect, & the laws favor a subdivision of property."³¹⁶

Even more striking is Madison's essay *Parties*, another one of the essays that he published in the *National Gazette* in 1791 and 1792 as part of his campaign of opposition to Alexander Hamilton's economic program. Madison offered, among others, the following methods for combatting party strife:

1. By establishing a political equality among all. 2. By withholding *unnecessary* opportunities from a few, to increase the inequality of property, by an immoderate, and especially an unmerited,

313. Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 8 *The Papers of Thomas Jefferson* 681, 682 (Julian P. Boyd ed., 1953).

314. 3 Irving Brant, *James Madison, Father of the Constitution: 1787-1800*, at 175 (1950).

315. See Letter from James Madison to Thomas Jefferson (June 19, 1786), in 9 *The Papers of James Madison*, supra note 299, at 76, 76-77. He also indicated, however, that those occupations were not, as a general matter, societally desirable:

From a more equal partition of property, must result a greater simplicity of manners, consequently a less consumption of manufactured superfluities, and a less proportion of idle proprietors & domestics. From a juster Government must result less need of soldiers either for defence agst. dangers from without or disturbances from within.

Id.

316. Id. at 76.

accumulation of riches. 3. By the silent operation of laws, which, without violating the rights of property, reduce extreme wealth towards a state of mediocrity, and raise extreme indigence towards a state of comfort.³¹⁷

Madison's essay recalls Jefferson's earlier letter. Not only do both call for redistribution, but they do so in similar language: Jefferson's "silently lessening the inequality of property" is echoed by Madison's "silent operation of laws."³¹⁸ Commenting on this essay, Brant observed: "Madison lived a century and a half too soon to be hauled before congressional committees as a subversive radical for talking like that, but one can only marvel at the historians who present him to modern generations as a conservative guarantor of the *status quo*."³¹⁹ More broadly, Brant stated:

Madison was well aware that in a competitive society, with public order and private rights maintained, property would flow ceaselessly into the hands of those most able to gain and hold it. . . . [For Madison,] one of the first objects of government was to protect the poor and near-poor by laws restraining concentration of wealth and the power of its holders.³²⁰

These statements date from 1950, and Brant has been criticized with some justice as seeking to make Madison into a proto-New Dealer.³²¹ But at the same time, Brant recognized what leading scholars have often denied: Madison's acceptance of state ordering of the economy in ways designed to equalize wealth.³²² As Lance Banning has pointed out, Madison had a profound ideological "commitment to a social order characterized by comparative equality, honest industry, frugality and simple manners."³²³ In other words, he remained committed to certain fundamental tenets of republicanism and a republican vision of property. This commitment caused him at certain points in his career to favor governmental actions—such as in tax policy and economic policy—that were intended to have redistributive consequences.³²⁴

317. James Madison, *Parties*, Nat'l Gazette, Jan. 23, 1792, in 14 *The Papers of James Madison*, supra note 285, at 197, 197.

318. See Nedelsky, supra note 209, at 45–46.

319. 3 Brant, supra note 314, at 175.

320. *Id.* at 174.

321. See Lance Banning, *The Hamiltonian Madison*, 92 Va. Mag. Hist. & Biography 3, 10 (1984).

322. See, e.g., Nedelsky, supra note 209, at 30–35 (1990) (Madison "opposed laws with redistributive consequences"); Alexander, supra note 226, at 329 n.230 (Madison unequivocally opposed government redistribution); Michelman, supra note 153, at 135; Frank I. Michelman, *Possession Versus Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319, 1331 (1987) ("Madison . . . upheld the sanctity of property as against political redistribution").

323. Banning, supra note 321, at 21.

324. For other examples, see Madison, *Right of Suffrage*, supra note 305, at 450, 452 (discussing with approval "equalizing tendency of laws" as way of preventing wealthy from getting too wealthy and too powerful); James Madison, *Note During the Convention for Amending the Constitution of Virginia*, in *Mind of the Founder*, supra note 289, at 406, 408 (salute to republican laws that regulate inheritance as operating to equalize wealth).

There are, then, two competing views of Madison and his conception of the relationship between government and private property. According to Nedelsky, Madison recognized the necessity of government regulation and accepted that it would sometimes have redistributive consequences. According to the thesis presented here, at certain times in his career, Madison actually favored the use of governmental power to redistribute wealth. Despite their differences, both theses recognize Madison's belief that government had to be free to advance some economic interests at the expense of others without incurring the obligation to make whole those who were injured. Given that conviction, he would not have drafted the Takings Clause to require compensation for government actions that diminished the value of property.

3. *The Absolute Protection of Physical Possession.* — Thus far, the discussion has highlighted what might be considered the limiting principle of the Takings Clause. Madison's view of government, property, and their places in society explains why he did not go further in limiting the federal government's power to affect property rights. But why he did he think that a takings clause was needed in the first place? Although Madison nowhere directly addressed this question, an examination of his writings and speeches indicates that he believed that physical property needed greater protection than other forms of property because its owners were peculiarly vulnerable to majoritarian decisionmaking. Specifically, he believed that the majoritarian decisionmaking process was least likely to protect the interests of landowners and slaveowners.

Madison frequently distinguished what he called the rights of property from what he called the rights of persons, and he argued that the history of the revolutionary era demonstrated that there was enormous tension between the two. Thus, in 1788 in criticizing Jefferson's proposed constitution for Kentucky and arguing for property qualifications for voting, he wrote:

The necessity of thus guarding the rights of property was for obvious reasons unattended to in the commencement of the Revolution. In all the Governments which were considered as beacons to republican patriots & lawgivers, the rights of persons were subjected to those of property. The poor were sacrificed to the rich. In the existing state of the American population, & American property[,] the two classes of rights were so little discriminated that a provision for the rights of persons was supposed to include of itself those of property, and it was natural to infer from the tendency of republican laws, that these different interests would be more and more identified. Experience and investigation have however produced more correct ideas on the subject.³²⁵

325. James Madison, Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788), in 11 *The Papers of James Madison* 285, 287 (Robert A. Rutland et al. eds., 1977) (alteration in original).

He added: "It is well understood that interest leads to injustice as well when the opportunity is presented to bodies of men, as to individuals."³²⁶ The interests of the rich and poor were opposed, and therefore neither could be trusted to protect the other: "Give all power to property; and the indigent [will] be oppressed. Give it to the latter and the effect may be transposed."³²⁷ At the same time, Madison felt that the propertied were less likely to undermine the rights of persons than the majority were to undermine the rights of property. Thus, he wrote in 1821: "As the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter."³²⁸ As previously indicated, Madison saw the Constitution and the structure of the federal government as a response to the problem of competing interests.³²⁹

Even as he was concerned that the Constitution should protect "the rights of property," Madison also recognized that conflicts about property were not limited to tension between the propertied and the propertyless. The interests of different categories of property holders were also in conflict. "The three principle classes into which our citizens were divisible," he told the federal convention,

were the landed the commercial, & the manufacturing. The 2d. & 3rd. class, bear as yet a small proportion to the first. The proportion however will daily increase. We see in the populous Countries in Europe now, what we shall be hereafter. These classes understand much less of each others interests & affairs, than men of the same class inhabiting different districts. It is particularly requisite therefore that the interests of one or two of them should not be left entirely to the care, or the impartiality of the third.³³⁰

326. *Id.*

327. *Id.* (alteration in original) (footnote omitted).

328. Madison, *Right to Suffrage*, *supra* note 305, at 450, 450–51.

329. See *supra* Part III.C.2.

330. Remarks of James Madison (debate of July 26, 1787), in 2 Farrand, *supra* note 197, at 118, 123, 124 (arguing that "[l]anded possessions were no certain evidence of real wealth" and that "some other [voting] criterion than the mere possession of land should be devised"). While arguing for direct election of one branch of the legislature, he advanced similar claims:

All civilized Societies would be divided into different Sects, Factions, & interests, as they happened to consist of rich & poor, debtors & creditors, the landed the manufacturing, the commercial interests What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. . . . The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests &

Of the three types of property identified by Madison—landed, commercial, and manufacturing—he believed landed property was the type that in the long run was most threatened by majoritarian rule. This belief stemmed from Madison's anticipation that this country would experience enormous population growth. As the passage quoted above indicates, in the 1780s, and indeed throughout his career, Madison predicted a population explosion in the United States and he believed that landowners would soon become a minority.³³¹

The increase in population was problematic for several reasons. First, it meant that, because fewer citizens would be freehold owners, fewer would have the independence that citizens should have. Second, the greater the number of the unpropertied, the more likely would they be to pass redistributive legislation. "An increase of population," Madison stated,

will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.³³²

The ideal solution to these problems was to limit suffrage to freeholders. Commenting on a proposal to impose a property requirement for voters for the House of Representatives, Madison told the Philadelphia convention: "Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty."³³³

parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in the case they shd. have such an interest, they may not be apt to unite in the pursuit of it.

Remarks of James Madison (debate of June 6, 1787), *in* 1 Farrand, *supra* note 197, at 132, 135–36.

331. See, e.g., Madison, *Right of Suffrage*, *supra* note 305, at 451 (editorial note written in 1821); James Madison, *Speech on the Power to Levy Direct Taxes* (June 12, 1788), *in* 11 *The Papers of James Madison*, *supra* note 325, at 121, 125 (comments at Virginia ratifying convention); see also McCoy, *supra* note 198, at 121–32 (noting Madison's post-war vision of American westward expansion); McCoy, *supra* note 211, at 192–93 (noting Madison's fear that "unfavored" landless class would become majority of population).

332. Remarks of James Madison (debate of June 26, 1787), *in* 1 Farrand, *supra* note 197, at 421, 422–23. Madison's comments regarding "symptoms of a leveling spirit" referred to Shays' Rebellion. See McCoy, *supra* note 198, at 129.

333. Remarks of James Madison (debate of Aug. 7, 1787), *in* 2 Farrand, *supra* note 197, at 196, 203. Although Madison continued to fear the propertyless majority, by the 1820s he concluded that it would be unfair and, given that the majority would eventually be propertyless, impracticable to limit the right to suffrage to the propertied. See Madison, *Right to Suffrage*, *supra* note 305, at 450–55 (written in 1821). For discussions of

Although the Constitution did not restrict suffrage to freeholders, Madison ultimately decided that through the "expansion of the sphere"—the central argument of Federalist Ten³³⁴—the Constitution adequately protected property rights *in general*. Expansion of the sphere, however, did not adequately protect the particular class of landed property. In preparing his notes of the convention for publication, Madison wrote:

[W]henver the Majority shall be without landed or other equivalent property and without the means or hope of acquiring it, what is to secure the rights of property agst. the danger from an equality & universality of suffrage, vesting compleat power over property in hands without a share in it: not to speak of a danger in the mean time from a dependence of an increasing number on the wealth of a few? In other Countries this dependence results in some from the relations between Landlords & Tenants in other both from that source, & from the relations between wealthy capitalists & indigent labourers. In the U.S. the occurrence must happen from the last source; from the connection between the great Capitalists in Manufactures & Commerce and the members employed by them.³³⁵

In writing this, Madison was simply applying conventional republican wisdom. Lacking financial independence, the propertyless also lacked political independence and would vote as their employers instructed them. As Madison's note indicates, there was no logic that compelled the conclusion that universal suffrage would favor one particular propertied interest over the other. The question of which interest would prevail would turn simply on which interest, when combined with those it employed, had the most votes. The landed interest was at risk simply because demographic trends in the United States ran against it; the future belonged not to "Landlords & Tenants," but to "the great Capitalists in Manufactures & Commerce and the members employed by them." Indeed, the massive confiscations of loyalist property, which Madison as a state legislator acted to end,³³⁶ provided a concrete contemporary demonstration of the risks faced by landowners.

Thus, the landed interest was peculiarly vulnerable to majoritarian decisionmaking. The propertyless, who would eventually become a majority in this country, would have the votes to secure their ends. "[T]he great Capitalists in Manufactures & Commerce" would be easily able to gain majority support by combining with their employees. For this rea-

Madison's views on the importance of providing protection for property interests, see McCoy, *supra* note 211, at 192-97; Jack R. Pole, *Political Representation in England and the Origins of the American Republic* 325-26, 374-75 (1966).

334. This argument is discussed *supra* at notes 305-308 and accompanying text.

335. Madison, *Right of Suffrage*, *supra* note 302, at 452.

336. See, e.g., Bill Prohibiting Further Confiscation of British Property (introduced Dec. 3, 1784), in 8 *The Papers of James Madison*, 173 (Robert A. Rutland et al. eds., 1973) (Madison's proposal to Virginia legislature on ending confiscation).

son, only the owners of land were endangered by majority rule. Against this background, it becomes clear why Madison thought a takings clause that established a rule of compensation when physical property was seized was necessary. Landed property owners could not rely on the political process for their protection and needed some extra measure of protection. At the same time, other types of property owners could rely on the political process to protect their interests; thus, for property interests other than those threatened with possible physical seizure by the government, it was enough for the takings clause to be hortatory.

Madison recognized that slaveowners were similarly threatened by the majoritarian process, and he imagined that the clause would protect them in the same way that it protected landowners. Madison believed that the Takings Clause established an absolute requirement that the government owed the slaveowner compensation whenever it freed a slave. Indeed, despite his anguish on the subject of slavery,³³⁷ Madison seems to have regarded slavery as perhaps the paradigmatic form of property subject to threat from the majority. Strikingly, although *Federalist* Ten is now considered Madison's central exposition of his views on property, he used the word "property" only eight times in that paper.³³⁸ His most frequent use of the word "property"—seventeen times³³⁹—was in *Federalist* Fifty-Four, where he defended Article I, Section Two of the Constitution (which counted slaves as three-fifths of a person for purposes of taxation and representation) on the grounds that "[g]overnment is instituted no less for protection of the property, than of the persons of individuals."³⁴⁰

Madison's conviction that the Constitution should protect all interests not only extended to slaveowners, but also applied to them with unique force. Slaveowners' "property" was jeopardized by the possibility that opposing interests would combine against them. Thus, in opposing giving each state equal representation in the Senate, Madison argued:

[E]very peculiar interest whether in any class of citizens, or any description of States, ought to be secured as far as possible. Wherever there is danger of attack there ought to be given a constitutional power of defence. But he contended that the States were divided into different interests not by their difference of size, but by other circumstances; the most material of which resulted partly from climate, but principally from <the effects of> their having or not having slaves. These two causes concurred in forming the great division of interests in the U. States. It did not lie between the large & small States: it lay between the Northern & Southern. and if any defensive power

337. See Ketcham, *supra* note 284, at 625.

338. See *The Federalist Concordance* 493 (Thomas Engeman et al. eds., 1988).

339. See *id.* at 494.

340. *The Federalist* No. 54, at 339 (James Madison) (Clinton Rossiter ed., 1961).

were necessary, it ought to be mutually given to these two interests.³⁴¹

In short, slaveowners were *the* most vulnerable interest group.

To solve this problem, Madison considered giving slaveholders greater representation in one house of the legislature by apportioning representation in that house on the basis of the entire number of inhabitants, both slave and free.³⁴² He finally endorsed basing representation in both houses of the legislature on the number of free inhabitants. He defended this position on the grounds that it would protect slaveowning interests better than a system in which states were equally represented in the Senate:

[T]he perpetuity [equal representation of the states in the Senate] would give to the [preponderance of the] Northn. agst. the Southn. . . . was a serious consideration. It seemed now to be pretty well understood that the real difference of interests lay, not between the large & small but between the N. & Southn. States. The institution of slavery & its consequences formed the line of discrimination. There were 5 States on the South, 8 on the Northn. side of this line. Should a proportl. representation take place it was true, the N. side would still outnumber the other: but not in the same degree, at this time; and every day would tend towards an equilibrium.³⁴³

For Madison, the failure of his proposal meant that slaveowning states were disadvantaged under the Constitution. The majority of the Senate and, at least in the short term, the majority of the House would be selected from free states. Thus, because interests hostile to those of the slaveowners would control both houses under the Constitution as ratified, Southern states would lack the "defensive power" needed to protect their interests. Moreover, slaveowners were particularly disadvantaged as a group because, even within the slaveowning states, a majority of people were not slaveowners and would thus lack sympathy for their cause. Thus, Madison told the Virginia state convention of 1829: "It is apprehended, if the power of the Commonwealth shall be in the hands of a majority, who have no interest in this species of property [i.e., slaves], that, . . . injustice may be done to its owners."³⁴⁴

341. Remarks of James Madison (debate of June 30, 1787) in 1 Farrand, *supra* note 197, at 481, 486.

342. See *id.* at 486.

343. Remarks of James Madison (debate of July 14, 1787), in 2 Farrand, *supra* note 197, at 2, 9-10. The quoted language reflects Madison's assumption that the current trends in population growth would continue and that the South would, in time, become more populous than the North. This assumption, in turn, accorded with the common view that, by the 1780s, much of the Northeast was already overpopulated. See McCoy, *supra* note 198, at 114, 114-17 ("[T]he pressure of population growth on a limited supply of land in some eastern areas of the United States, especially in New England, seems actually to have created by the 1780s a situation of 'crowding'").

344. James Madison, Speech at Virginia Convention (December 2, 1829), in *Mind of the Founder*, *supra* note 289, at 402, 404.

This disadvantage was potentially critical because of the possibility that the national government would eventually move to abolish slavery.³⁴⁵ As Madison was aware,³⁴⁶ during the state ratification debates, James Wilson—with Madison, one of the primary authors of the Constitution—contended that under the Constitution, “Congress will have the power to exterminate slavery within our borders.”³⁴⁷ In the Virginia ratifying convention Anti-federalists Patrick Henry and George Mason asserted, as a reason to oppose ratification, that Congress would have the power to end slavery.³⁴⁸ Madison’s response during the Virginia ratifying convention, and throughout his career, was that the Constitution did not delegate that power to the national government.³⁴⁹ While Madison’s view doubtless reflected the implicit understanding of the framers,³⁵⁰ the possibility remained that, in the absence of a constitutional clause explicitly barring such action, the majority would seek to abolish slavery under the Constitution, or, alternatively, that they would seek a constitutional

345. The national government would not, however, have been able to do so before 1808, since the Constitution protected the slave trade until twenty years after ratification. See U.S. Const. art. I, § 9, cl. 1.

346. See Letter from James Madison to Robert Walsh (Nov. 27, 1819), in *Mind of the Founder*, supra note 289, at 320, 321–22 & nn.1–2 (discussing published reports of Wilson’s speeches in the Pennsylvania ratifying convention concerning Congress’s power under the Constitution to abolish slavery and Henry’s and Mason’s statements at the Virginia ratifying convention on the same subject).

347. Remarks of James Wilson at the Pennsylvania Convention (Dec. 4, 1787), in 2 *The Documentary History of the Ratification of the Constitution* 469, 499 (John P. Kaminski & Gaspare J. Salding eds., 1993) [hereinafter *Documentary History*]. Madison in 1819 argued that the “fairest construction” of Wilson’s meaning was not that Congress had the power to abolish slavery, but that its power after 1808 to end the importation of slaves would set an example which would eventually cause all states to “yield[] to the general way of thinking & feeling” and abolish slavery. Letter from James Madison to Robert Walsh, supra note 342, at 321 n.1.

348. See Remarks of Patrick Henry at the Virginia Convention (June 24, 1788), in 10 *Documentary History*, supra note 347, at 1473, 1477 (“The majority of Congress is to the North, and the slaves are to the South.”); Remarks of George Mason at the Virginia Convention (June 11, 1788), in 9 *Documentary History*, supra note 347, at 1142, 1161 (“[T]here is no clause in the Constitution that will prevent the Northern and Eastern States from meddling with our whole property.”)

349. See Remarks of James Madison at the Virginia Convention (June 24, 1786), in 10 *Documentary History*, supra note 347, at 1473, 1503; Letter from James Madison to Robert Evans, supra note 289, at 318–19; see also David F. Epstein, *The Political Theory of The Federalist* 104 (1984) (noting Madison’s insistence that federal government lacked authority to abolish slavery).

350. There is relatively little evidence here on one side or the other. The fact, however, that Southern defenders of slavery—who fought so bitterly against restrictions on the slave trade—did not demand a textual provision explicitly guaranteeing that Congress would not be able to abolish slavery compellingly indicates that it was assumed that Congress did not have such a power. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 28–30 (1981).

amendment banning slavery. Indeed, at the end of his career, Madison privately favored the latter course of action.³⁵¹

By providing that abolition required compensation, the Takings Clause gave the slaveowners the "power of defence"³⁵² that they lacked under the unamended Constitution. The Takings Clause therefore served a similar function with respect to landowners and slaveowners. Without Madison's proposed structural remedy, the Constitution would have placed both groups at a distinct disadvantage. Madison thus saw that the balance between competing interests would generally ensure that government under the Constitution would ultimately produce a just result. But that balance did not exist in the case of slaveowners and property owners. For different reasons, the core property claim of each group was in opposition to that of the majority. Madison's comments during the ratification debate and at the Constitutional Convention did not indicate that any other interests faced a similar threat. Prior to the passage of the Takings Clause, neither slaveowners nor landowners were able to check majority factions from compromising their property rights.

For Madison, then, the Takings Clause protected against political process failures. It mandated a remedy—compensation—in those classes of cases in which the political process was unlikely to consider property claims fairly. It should be added that Madison would have recognized that a rule mandating compensation for all physical seizures, but nothing else, was both overinclusive and underinclusive as a remedy for the kinds of process failure with which he was concerned.³⁵³ For Madison, then, the takings principle represented an attempt to frame an intelligible legal rule that mediated between his competing concerns. He saw property interests in land and slaves as particularly vulnerable in the political process.³⁵⁴ At the same time, he knew that a rule that required compensation whenever a governmental action diminished the value of property (or even the value of some particular kind of property, such as land or slaves) would be inconsistent with the fact that governmental operations inevitably created winners and losers; to require that all losers be compensated would be inconsistent with the functioning of government.³⁵⁵

351. See Letter from James Madison to Robert Evans (June 15, 1819), *supra* note 289, at 318–19.

352. Remarks of James Madison (debate of June 30, 1787), *in* 1 Farrand, *supra* note 197, at 481, 486.

353. For example, it would not mandate compensation for regulations (such as certain tariffs) that disproportionately affected landed interests (or that disproportionately affected slaveowners); if, as Madison believed, landed interests (and slaveowning interests) were politically vulnerable and if that political vulnerability lay behind the adoption of some tariff, the rule was therefore underinclusive. At the same time, the clause uniformly mandated compensation when physical property was seized, and to the extent that in some particular situation owners of seized property had fully participated in the political process and, despite the fact that their claims were fairly considered, had simply lost, as any faction loses at some times, then the rule was overinclusive.

354. See *supra* text accompanying notes 331–352.

355. See *supra* text accompanying notes 298–324.

A requirement of compensation for physical takings would allow government to go on because it was limited in scope; at the same time, it would create a remedy where there was a particularly high likelihood of process failure (because landowners and slaveowners were disadvantaged), where the consequences of that failure were particularly dramatic and threatening to the economic well-being of the property owner (i.e., where there was physical seizure of land or slaves), and where (because of the history of Loyalist land confiscations and because of ratification debates statements about abolition) there was reason to fear that the majority would act against private property interests. Moreover, the compensation requirement, although limited, would provide the basis for political appeals in a broader range of cases.

Other proponents of the Fifth Amendment's Takings Clause and its predecessor clauses would not have had similar grounds for concern about overinclusivity and underinclusivity. Seizures of goods by the military and confiscation of land grants by legislatures in which the affected landowners were either unrepresented or imperfectly represented are instances in which the process failure directly undermines possessory interests in physical property (rather than other interests in physical property).³⁵⁶

In sum, the background understanding (i.e., almost all of the concerns that led to the adoption of previous takings clauses), the framers' intent (i.e., Madison's intent), and the ratifiers' intent (to the extent that we have evidence of it through Tucker's observation) all indicate that the Fifth Amendment's Takings Clause should be understood as concerned with redressing political process failure. There was, admittedly, not a consensus motive for all the particulars. Madison was worried about majoritarian confiscation of land and slaves. The Vermont farmers opposed invalidation of their land grants by a legislature in which they were the minority. Some proponents of the Northwest Ordinance may have feared that the territorial legislature would revoke the land grants of the unrepresented. There was a widespread reaction against military confiscation of personal property. However, these various understandings of why a takings clause was needed shared the same basic themes: Physical property was vulnerable in the political process and the Takings Clause sought to redress that problem.

IV. A POLITICAL PROCESS-BASED THEORY OF THE JUST COMPENSATION CLAUSE

The previous Part provided historical evidence indicating that the Takings Clause was originally intended to remedy certain types of process failure. The relevance of this original understanding to current takings jurisprudence remains for discussion. There are several plausible re-

356. See *supra* text accompanying notes 226–278 (discussing non-Madisonian support for takings clauses).

sponses to the historical evidence presented in this Article. One might follow a traditional originalist approach and return to the practice that existed before *Pennsylvania Coal*; that is, compensation only for physical appropriations of property. Alternatively, one might acknowledge the original understanding and yet treat it as irrelevant to modern adjudication. This Part rejects these approaches and argues for a political process-based theory of the Takings Clause, inspired by its original meaning and purpose, yet modified to reflect the changes in economic and political circumstances since the late eighteenth century.

This theory draws on a model recently developed by Professor Lawrence Lessig³⁵⁷ showing how the original understanding can be "translated" into a modern context. This Part argues that translating the original understanding into a contemporary takings jurisprudence means that courts today should protect those whose property interests are, given modern political realities, particularly unlikely to receive fair consideration from majoritarian decisionmakers. Thus, the translation of the original understanding outlined here would interpret the Takings Clause to provide heightened protection to the property interests of those who have been singled out and the property interests of discrete and insular minorities.

This Part begins by explaining why a translation model is superior to traditional originalism and to non-originalist methods of interpretation. It then describes how a translation of the original understanding would work in practice. Finally, this Part demonstrates why the resulting process-based model of takings adjudication would be preferable to the current state of takings jurisprudence.

A. *Why Translate?*

An originalist model of constitutional interpretation is attractive for two related reasons. First, it constrains judicial decisionmaking to a significant degree. Rather than deciding independently what factors are relevant to a case, originalist judges defer to already established choices. As a result, originalism accords with the belief that the rule of law requires judges to follow externally imposed rules, rather than resolve cases in accordance with their own personal views. Second, originalism connects constitutional decisionmaking with majoritarian decisionmaking. Originalist judges are implementing the considered choices made by "We the People" under circumstances that fostered careful deliberation and that "We the People" have not subsequently altered.³⁵⁸

357. See Lessig, *supra* note 10.

358. See *The Federalist* No. 39, at 241 (James Madison) (Clinton Rossiter ed. 1961) ("[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people . . ."); 1 Bruce Ackerman, *We the People: Foundations* 285-87 (1991) (discussing "mobilized deliberation" and American higher lawmaking);

Under the traditional originalist approach to constitutional interpretation, judges construe a text as it was construed at the time of its ratification. Robert Bork, the leading advocate of this approach, has described it as follows: "What is the meaning of a rule that judges should not change? It is the meaning understood at the time of the law's enactment."³⁵⁹

The translator is also an originalist, but she looks not to the concrete constitutional understandings of "We the People," but to the underlying values that "We the People" embraced. According to Professor Lessig, a translator seeks to identify the ends that the Constitution's framers sought to advance and then interprets a constitutional provision in a way that best advances those ends in today's world. The translator begins by studying the historical context in which constitutional text was written and examining what the constitutional text meant in that context. She then determines what factual presuppositions underlying the original interpretation are no longer accurate. Finally, she reinterprets the text in light of changed circumstances, altering the original reading as little as possible while seeking its modern "equivalent."³⁶⁰

From an originalist standpoint, translation is a better model than traditional originalism because the available evidence suggests that it better reflects the original approach to constitutional interpretation. The framers were not traditional originalists. They created a terse, open-ended constitution whose meaning would change in response to changed circumstances. In the debates about ratification, the Anti-federalists repeatedly claimed that a constitution should be more explicit and detailed in its grants of power and limitations.³⁶¹ The Federalists, in contrast, made clear that they had intended to draft a flexible document. As historian Michael Lienesch has written, "[T]he Federalist founders seemed surprisingly at ease in making the case for experimentation and flexibility. . . . Although Federalists did not assume automatic progress, they did believe that their politics could be adapted to future circumstances."³⁶²

This notion of an adaptable Constitution is represented perhaps most famously by Chief Justice Marshall's statement in *McCulloch v. Maryland*:³⁶³ "We must never forget it is *a constitution* we are expounding."³⁶⁴ Such a conception of the Constitution as flexible was the norm. Drawing on his analysis of common law interpretive techniques and early discussions of constitutional meaning, Professor H. Jefferson Powell contends that the framers did not intend their specific subjective

359. Robert Bork, *The Tempting of America* 144 (1990).

360. Lessig, *supra* note 10, at 1263. Lessig summarizes his model at *id.* For precursors to his approach, see *id.* at 1171 n.32. In developing his model, he does not argue for it; rather, his end is simply to outline what a translation model would look like. See *id.* at 1173.

361. See Lienesch, *supra* note 209, at 147-50.

362. *Id.* at 151.

363. 17 U.S. (4 Wheat.) 316 (1819).

364. *Id.* at 407.

intentions to bind future generations and that they believed that constitutional meaning would evolve over time.³⁶⁵ Indeed, there is evidence that many in the framing generation employed an approach to constitutional interpretation that was anti-literalist³⁶⁶ and thus even more flexible than Powell's work suggests. For example, in the one American case prior to ratification of the Constitution in which we have evidence of substantial discussions of constitutional interpretation, Virginia's 1782 *Case of the Prisoners*,³⁶⁷ both the presiding judge and the members of the bar who argued the case repeatedly invoked the spirit of the state constitution as a guide to interpretation.³⁶⁸ In short, serious deference to original intent requires deference to the framers' conception of constitutional construction, and the information that we have about that conception supports a translation model because it allows for the interpretive flexibility that the framers desired.

At the same time, a translation model is superior on non-originalist grounds. It aspires to be faithful to the text, history, and structure of the Constitution, while avoiding the problems of a narrow, inflexible originalism that offers an inadequate account of continuity and change in constitutional interpretation. Perhaps nowhere is this more evident than with the Takings Clause. As this Article has shown, there was a reason why the Bill of Rights recognized the principle that the government must always pay when it physically takes the individual's property, but that it is never under an obligation to pay when government actions diminish the value of property. Yet the world has changed so much that to modern thinkers this line between when compensation is mandatory and when it is not appears incoherent and unintelligible, and an effort in recovery has been needed to make the underlying rationale comprehensible. A traditional originalism yields a reading of the Takings Clause that is clearly unpersuasive to almost everyone today—so even originalists such as Black and Scalia are not originalists when it comes to the Takings Clause. Moreover, traditional originalism is at odds with seventy years of Supreme Court precedent, which has held that some regulations can give rise to a compensation requirement. A translation model, unlike traditional originalism, allows the adaption to changed circumstances that is needed for a reading of the clause to have any non-originalist appeal.

365. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885, 902-04 (1985).

366. The term is Professor Morton Horwitz's. See Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 Harv. L. Rev. 30, 49-51 (1993) ("a distinct anti-literalism seems to have been present among some of the Virginia founders").

367. *Commonwealth v. Caton*, 8 Va. (4 Call) 634 (1782) (case was contemporaneously known as *Case of the Prisoners*).

368. See Treanor, *supra* note 277, at 544-52 (discussing opinion of Chancellor Pendleton and arguments of Tucker and Randolph); see also *id.* at 554-56 (discussing *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793)).

Finally, a translation model, unlike a traditional originalist model, allows us to benefit from the insights of the framing generation. The individuals who drafted and then defended the Constitution were a remarkable group. Madison, Wilson, and Hamilton, to take the most prominent examples, were subtle and powerful thinkers and experienced leaders. In a serious and considered way, they drew on what they had seen in the revolutionary era, a time of fundamental political transformation, and participated in the re-conceptualization of government. More broadly, the process of shaping the state constitutions, the federal constitution, and the Bill of Rights produced widespread sustained and thoughtful deliberation about the nature of government. This conjunction of factors—accomplished politicians with remarkable intellectual gifts participating in the constitution making of “We the People”—is unique in American history. We can therefore learn from the framers even if we view their work simply as political philosophy, rather than as the creation of the Constitution and the Bill of Rights that still bind us. But if we do what traditional originalism calls for and focus on the concrete formulations that the framers adopted, we necessarily miss what they were trying to do. In contrast, the translator asks what the purpose of the concrete formulation was, and thereby allows us to learn, for example, what motivated the framers to protect certain property interests from the majority. In other words, the translator uncovers the framers’ insights and enables us to profit from them today.

B. Translating the Original Understanding

Having discussed the general benefits of the translation model, this section now applies that model to a concrete problem—the original understanding of the Takings Clause. It begins by isolating the intended purpose of the clause at the framing and then examines the way in which society has changed since then. Taking these factors into account, it proposes a theory of takings adjudication that is true to the origins of the clause, yet adapted to the political, social, and economic realities of contemporary society.

1. *The Original Understanding.* — As we have seen, the federal Takings Clause and its predecessor clauses, as they were originally understood, divided governmental actions affecting property into two groups. When the government physically took property, it owed compensation. Any other governmental action, no matter how severely it affected the value of property, did not give rise to a compensation requirement. This requirement applied to physical takings because the framers believed that majoritarian decisionmaking processes would not give fair consideration to the individual’s interest in not having her property physically seized by the government.

The clause sought to remedy failures in the political process. But the underlying idea was *not* that all majoritarian decisions should be reviewed to determine whether the process behind any particular decision was fair

or unfair. Rather, heightened constitutional protection was provided only for the limited category of decisions in which unfairness was most likely. At the same time, while the clause only mandated compensation in a limited sphere, it had a broader significance: It was also designed to teach the people that governmental actions that arbitrarily affected property interests (including the value of property) were illegitimate.

One might argue, however, that in takings cases involving state and local governments, the relevant intent is not that of the framers of the Fifth Amendment, but rather that of the framers of the Fourteenth Amendment. Under this view, the critical period for the translator would not be 1789 to 1791, when the Fifth Amendment's Takings Clause was proposed and ratified, but 1866 to 1868, when the Fourteenth Amendment—which has been held to incorporate the Fifth Amendment's Takings Clause against the states³⁶⁹—was proposed and ratified.³⁷⁰ Under closer scrutiny, however, the selection of the relevant period becomes more complicated.

In interpreting the Fourteenth Amendment, the threshold question for the translator is whether the framers of the Fourteenth Amendment sought to incorporate the provisions of the Bill of Rights. If they did not, then incorporation is simply the handiwork of the judiciary and there is no governing original intent concerning what incorporation of the Fifth Amendment's Takings Clause meant.³⁷¹ Thus, "the People" considered which property interests to protect from the government only once—at

369. It is clear that the Takings Clause is now deemed applicable to the states through the Fourteenth Amendment. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978). Because the line between substantive due process and incorporation was not always a clear one, the precise case that incorporated the Takings Clause is a matter of dispute. The standard citation is to *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 239 (1897). See, e.g., *Dolan*, 114 S. Ct. at 2316; Bosselman et al., *supra* note 12, at 115 & n.27; Scheiber, *supra* note 297, at 243. Justice Stevens, however, has argued that this was a substantive due process case. See *Dolan*, 114 S. Ct. at 2326–27 (Stevens, J., dissenting). Professor Siegel has stated that incorporation occurred in *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896). See Siegel, *supra* note 98, at 216 n.130. In *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399 (1894), the Court appears to hold that the Takings Clause is incorporated through the Fourteenth Amendment's Equal Protection Clause.

370. For the relevant dates of the Fourteenth Amendment, see Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 57, 154–55 (1986).

371. The classic formulation of the anti-incorporationist historical argument is Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *Stan. L. Rev.* 5 (1949). The leading current proponent of this position is Raoul Berger. See, e.g., Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (1989); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 134–56 (1977); Raoul Berger, *Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat*, 42 *Ohio St. L.J.* 435 (1981); Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response*, 44 *Ohio St. L.J.* 1 (1983); see also William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 123 (1988) ("Historical analysis of the framing and ratification of the Fourteenth

the time of the proposal and ratification of the Fifth Amendment's Takings Clause. Even in construing the Fourteenth Amendment, a translator should therefore look to the earlier time period to discover original intent because the principle underlying the translation model is that the judiciary should defer to considered majoritarian decisionmaking embodied in constitutional law and the earlier period is the only one in which such decisionmaking occurred.³⁷²

The weight of recent scholarship, however, supports the view that incorporation (through the Privileges and Immunities Clause) was part of the original understanding of the Fourteenth Amendment.³⁷³ To the extent that there was a particular desire to apply the Takings Clause

Amendment cannot, by itself, resolve the dilemma created by the conflicting commitments of those who participated in the process.”).

372. Additionally, if one believes that the ratifiers of the Fourteenth Amendment did not intend to incorporate the protections of the Bill of Rights against the states, one might argue that a modern translation should not apply the Takings Clause against the states at all. Thus, the process failure concerns of the framers and ratifiers of the Takings Clause would be irrelevant to the interpretation of the Fourteenth Amendment, since the Takings Clause would not bind the states.

Such an approach might work as a pure example of translation. But it would run counter to a fundamental (and precedentially-established) principle of modern constitutional structure, which is that some of the provisions of the Bill of Rights, including the Takings Clause, are applicable against the states. See *supra* note 369 (discussing cases holding Takings Clause incorporated against the states). As Professor Lessig has suggested, the translator may ultimately conclude that, because of other concerns, the translation may not be the best reading of a constitutional text. See Lessig, *supra* note 10, at 1263. Thus, in view of larger concerns of constitutional structure, even if the translator believes that incorporation was not part of the original intent of the Fourteenth Amendment, she should still hold that the Takings Clause applies against the states. The question then becomes how to interpret the Takings Clause. If a principle goal of the translation model is to promote deference to the considered judgments of the majority acting as “We the People,” that goal would again suggest that, even in interpreting the Fourteenth Amendment, the translator should look to the ends that animated those who framed and ratified the Fifth Amendment's Takings Clause.

At a deeper level, however, as indicated in the text, see *infra* text accompanying notes 374–378, the weight of historical evidence favors incorporation. Thus, in his leading work, Professor Curtis has found 30 statements of Republicans in the 38th and 39th Congresses indicating that at least some Bill of Rights liberties limited the states; he found none to the contrary. See Curtis, *supra* note 370, at 112. As a result, the translator should interpret the Fourteenth Amendment in light of incorporation, and such a view would lead her to look at the ends of the framers and ratifiers of the Takings Clause, for reasons set forth in the text. See *supra* text accompanying note 360.

373. The leading work (and one that convincingly presents the case for incorporation) is Michael Kent Curtis's *No State Shall Abridge* (discussed *supra* notes 370, 372). For other accounts developing the evidence of incorporation, see Amar, *supra* note 297; Richard L. Aynes, On Misreading John Bingham and the Fourteenth Amendment, 103 Yale L.J. 57 (1993); Robert J. Kaczorowski, Searching for the Intent of the Framers of the Fourteenth Amendment, 5 Conn. L. Rev. 368 (1972–1973). The discussion in the text concerns a translator's interpretation of the Fourteenth Amendment. If one posits that incorporation was intended, and if one wanted to provide a traditional original intent reading of the takings protections encompassed by the Fourteenth Amendment, then the Fourteenth Amendment should be read to provide compensation only for physical

against the states, it was driven by the same impulse that animated the Fifth Amendment's Takings Clause: protecting the property interests of a group that was isolated from the normal give and take of the political process. Congressman John Bingham, the principal author of what became Section One of the Fourteenth Amendment, feared that former Confederate states would seize the property of Unionists. He declared:

[T]he rebels will be found in a majority of three to one or four to one in every one of the States that have been engaged in rebellion, except in Tennessee.

How will you prevent that overpowering majority from taking possession of those reconstructed governments? . . . Where is the power in Congress, unless this or some similar amendment be adopted, to prevent the reenactment of those infernal statutes of banishment and *confiscation* and imprisonment and murder under which people have suffered in those States during the last four years?³⁷⁴

During the course of the committee meetings about the Fourteenth Amendment, Bingham proposed imposing on the states just compensation and equal protection requirements (and not due process or privileges and immunities),³⁷⁵ and the support for this unsuccessful proposal reflected this perceived need to safeguard Unionist property after former rebels returned to power.³⁷⁶ But, of course, this version was not passed. It was rejected by a vote of seven to five, and the committee opted instead for the broader language of Section One.³⁷⁷ Incorporationist scholarship indicates the framers adopted this language in order to subject the states to the same restraints as the federal government.³⁷⁸ Thus, passage of the Fourteenth Amendment does not reflect a separate consideration of what specific property interests needed protection from the government. Incorporationist scholarship therefore leads to the same conclusion as non-incorporationist scholarship: The period in which the Fifth Amendment's Takings Clause was proposed and ratified is the only time at which the nation considered which property rights needed protection from the government. The translator should therefore focus on the con-

seizures. Extension of takings doctrine beyond physical takings did not occur until after the Fourteenth Amendment was ratified. See note 94 and text accompanying notes 93-94.

374. Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (statement of Congressman John Bingham) (emphasis added).

375. See Benjamin Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 85 (1914) ("nor shall any state deny any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation").

376. See Earl Maltz, *The Fourteenth Amendment as a Political Compromise—Section One in the Joint Committee on Reconstruction*, 45 Ohio St. L.J. 933, 959 (1985).

377. See Curtis, *supra* note 361, at 84.

378. See *id.* at 91; Aynes, *supra* note 373, at 66-94; see also Cong. Globe, 38th Cong., 1st Sess. 2765-66 (1864) (statement of Senator Jacob Howard, chair of the Senate delegation to the joint committee, enumerating the right to compensation among the privileges and immunities guaranteed by the proposed Fourteenth Amendment).

cern with process failure animating the Fifth Amendment's Takings Clause. Having determined that the Takings Clause was originally intended to remedy certain kinds of process failure, she should offer a reading of the clause that serves the same ends in today's society.

2. *The Takings Clause and Changed Circumstances* — At the time of the framing and ratification of the Takings Clause and its predecessor clauses, different people were concerned with risks to different possessory interests, but there was nonetheless a close match between the end served by the clause—remedying process failure—and the means adopted—requiring compensation for physical takings. Today, protection of physical possession no longer advances the broader end of remedying process failure.

Slaveownership obviously no longer falls within the ambit of the clause. Madison believed that slaveowners were particularly politically vulnerable because those who did not own slaves would be unlikely to enter into political combinations with them. However, the Thirteenth and Fourteenth Amendments rendered this aspect of the clause moot by requiring uncompensated emancipation of all slaves.³⁷⁹

The situation with respect to landownership is more complex, but the essential point—that the affected property interest no longer needs heightened protection—is also applicable here. Critical factual presuppositions that animated Madison are inconsistent with contemporary realities. Madison anticipated that in the near future most Americans would not own land. Moreover, in accordance with republican theory, he thought landowners would be particularly weak because employees, dependent on their employers for support, would follow their employers' wishes and most employers would be engaged in trade or industry, rather than farming. Neither assumption is accurate today. According to the most recent census report, sixty-four percent of Americans own their own homes.³⁸⁰ In addition, voter studies indicate that voting behavior reflects variables like class, gender, ethnicity, region, and age, not the voting orientation of one's employer.³⁸¹

Indeed, a group of landowners faced with seizure of their land for a public use are particularly well situated to secure compensation from majoritarian decisionmakers. As Professor Daniel Farber has observed, "[I]f public choice theory has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political

379. See U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States"); id. amend. XIV, § 4 ("[N]either the United States nor any State shall assume or pay . . . any claim for the loss or emancipation of any slave").

380. See Andrea Stone & Mindy Fetterman, Home Owning Takes First Dip Since '30s, *USA Today*, June 11, 1991, at 1A.

381. See, e.g., Angus Campbell et al., *The American Voter* 90–93, 193–94 (1964); John A. Crittenden, *Parties and Elections in the United States* 88–100 (1982); William H. Flanigan & Nancy H. Zingale, *Political Behavior of the American Electorate* 87–91 (4th ed. 1979).

process. Thus, landowners have some political advantages in seeking compensation."³⁸² Because the stakes are typically high and the bearers of the loss are easily identifiable, affected property owners can organize to demand compensation with relative ease. United by one issue of compelling interest, landowners are in a position to engage in legislative logrolling that will enable them either to obtain compensation or to block the project, trading off votes on other matters for support on the confiscation issue. Moreover, in a society of property owners, even in the absence of logrolling on any particular project, the political majority has an interest in compensating for this particular type of property loss. As a group that may one day face confiscation of its own land, a uniform practice of compensation is clearly in its own interest. Finally, people commonly place a higher subjective value on forms of property with which they have a strong personal relationship than on property of equivalent dollar value that lacks such association.³⁸³ For this reason, people seem likely to fight particularly hard to block a proposed government activity that would take away their homes or, alternatively, for psychic as well as economic reasons, to fight particularly hard for compensation.³⁸⁴

As previously noted, landowners were routinely awarded compensation before it became a constitutional requirement.³⁸⁵ In fact, as Professor Farber has pointed out, "compensation for physical invasions is almost universal in democracies."³⁸⁶ That compensation is the norm even in the absence of a constitutional compensation requirement shows that the political process generally protects landowners from the risk of uncompensated confiscation. While Madison thought that for demographic reasons this protection would disappear (and that is part of the reason why he proposed the Takings Clause), he proved a poor prophet. None of this is to say that today there would never be situations when,

382. Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 *Int'l Rev. L. & Econ.* 125, 130 (1992). It should be added that the advantages that landowners currently possess, see *infra* text accompanying notes 382-84, were also possessed by them in Madison's day. The critical point is that the offsetting disadvantages that he feared did not materialize.

383. For example, the family home is seen as more important than stock of equivalent economic value. See Margaret J. Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957, 1003-08 (1982) (discussing personhood perspective and takings).

384. On the reasons why landowners are in a good position to obtain compensation, see Farber, *supra* note 6, at 289-90, 298-99. Professor Levmore has argued that, when a government project threatens a large number of landowners (as is the case with a large road project), they are well able to secure compensation, but that a small number of landowners are at a relative disadvantage in securing redress from the political process. See Levmore, *supra* note 6, at 320; Levmore, *supra* note 154, at 1352-53. This point, however, is consistent with the overall theory of this piece. Landowners do not deserve special protection; they, like other property owners, deserve special protection only when they have been singled out.

385. See Treanor, *supra* note 19, at 696 n.6; *supra* note 28, text accompanying notes 18-19.

386. Farber, *supra* note 6, at 290 n.37.

without a rule requiring compensation, landowners would not be compensated. Nor is it to say that a translated law of takings will never require compensation when land is taken. In fact, the takings doctrine developed in the next Section requires compensation in some circumstances when land is taken. But landownership is not now a particularly vulnerable kind of property interest. Therefore, as we begin to translate the original understanding and to determine which property interests by their very nature are particularly at risk of being victimized by the political process, we should conclude that landowners do not need special protection.

Similarly, the regional minority issue that lay behind Vermont's just compensation clause is no longer a problem today. As Vermonters realized, their distance from the state government made them powerless as a practical matter.³⁸⁷ Given improvements in communication and transportation, distance no longer impedes participation in the political process.³⁸⁸

The situation in the Northwest Territories, where one company from outside of the political entity owned much of the land within yet was at risk because of its lack of representation in the legislature, has its closest modern analogue in Professor William Fischel's suggestion that, while discrimination against outsiders does not exist at the state or federal level, it may exist at the local level, where those in charge of land use regulation may seek to impose burdens on property owners who are unrepresented in the electoral process.³⁸⁹ But as Professor Vicki Been has convincingly argued, the mobility of modern capital means that, if one community overregulates, investors will simply take their money elsewhere. Thus, there is currently no need to provide special protection for investors who live outside of the polity.³⁹⁰

The need for special protection with respect to confiscation by the military persists. Now, as in the late eighteenth century, when the military seizes an individual's goods without statutory authorization or provision for compensation, that person has been singled out without any sanction of the political process. Unless she can join others who are simi-

387. See *supra* notes 241-243 and accompanying text.

388. See Amar, *supra* note 297, at 1212-15 (discussing how technological change has made the concerns that were raised at the time of the Constitution about the distance between constituents and the capitol irrelevant by the end of the Civil War).

389. See William A. Fischel, Introduction: Utilitarian Balancing and Formalism in Takings, 88 *Colum. L. Rev.* 1581, 1582-84.

390. See generally Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 *Colum. L. Rev.* 473 (1991) (arguing that the exit option affects local governments' exaction policies). Fischel and Been debate their conflicting views in William A. Fischel, Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?, 67 *Chi.-Kent L. Rev.* 865, 897-98 (1991); Vicki Been, The Perils of Paradoxes—Comment on William A. Fischel, "Exploring the Kozinski Paradox: Why is More Efficient Regulation a Taking of Property?", 67 *Chi.-Kent L. Rev.* 913, 920-21 (1991).

larly situated, she is poorly positioned to obtain subsequent redress from that process. Thus, the Supreme Court has focused on the "extraordinary and unforeseen" circumstances that give rise to such seizures as both the reason why the seizures are legitimate and the reason why compensation is mandated:

Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.³⁹¹

In sum, because of changes that have occurred over time, many (although not all) of the property interests that in the late eighteenth century were considered to be inadequately protected by the political process either no longer exist or are now adequately protected by that process. Thus, special protection for possessory property interests no longer serves the principle underlying the Takings Clause. The job of the translator, therefore, is to determine what property interests must now be protected if we are to be consistent with the original purposes of the clause.

3. *The Translation.* — Public choice theorists have offered a range of ideas about when process failure affects property interests. The constitutional jurisprudence of Professor John Hart Ely indicates that discrete and insular minorities suffer from heightened disadvantages in the political process. This Section draws on these different insights as the basis for its translation of when the Takings Clause currently requires compensation. In addition to mandating compensation in certain situations, a translated Takings Clause, like the original, will also serve an educative function that will be discussed in this Section as well.

a. *Public Choice Theory.* — In recent years, Professors Farber,³⁹² Fischel,³⁹³ and Levmore³⁹⁴ have offered public choice theories of the Takings Clause. Like the original understanding of the Takings Clause,

391. *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627-28 (1871); see also *United States v. Caltex*, 344 U.S. 149, 152 n.3 (1952) (citing *Russell* as binding precedent and quoting language quoted in text of this Article, although holding that the case did not require compensation when goods were destroyed to keep them from the enemy).

392. See Farber, *supra* note 6; Farber, *supra* note 382.

393. See Fischel, *supra* note 390.

394. See Levmore, *supra* note 6; Levmore, *supra* note 154.

these theories treat the central concern of the Takings Clause as protecting those who suffer property losses because of process failure. These public choice theories, however, offer different accounts of what type of process failure needs to be averted. Because of their different focuses, the theories provide useful bases for consideration of how a translated Takings Clause would guard against process failure.³⁹⁵

Fischel's model offers the broadest protection to property owners. He argues that courts construing the Takings Clause should direct compensation when property owners are "victims of democratic excess."³⁹⁶ Fischel provides the following test for the identification of such "victims:" "[T]hey are a minority in a jurisdiction in which the usual minoritarian political processes are attenuated—that is, they are subject to local governments or to politically insulated special commissions, and they possess assets whose regulation cannot be escaped by moving them to other jurisdictions or other employments."³⁹⁷ The governmental entity making the decision is of critical significance in Fischel's theory: "[C]ourts can save some of their scarce political capital by ignoring all but the most extreme regulations enacted by larger units of governments, such as the United States Congress, most states, and some large cities and counties."³⁹⁸ In our system, larger units of government are characterized by pluralist politics—with logrolling and the opportunity for deal-making—and this gives property owners "a realistic opportunity to politically protect themselves."³⁹⁹ In contrast, empirical studies indicate that local government decisionmaking is characterized by majoritarian politics, rather than by deal-making. Because local governments typically have one legislative chamber, rather than two, and because their legislative agenda has a relatively limited number of items, there are fewer opportunities for logrolling. As a result, special interests are likely to lose consistently.⁴⁰⁰ Such interests will not be able to bargain in order to protect themselves, and therefore need judicial protection. When a larger unit of government is involved, such protection is generally unnecessary. In a case like *Lucas*, for example, where regulation issues at the state level, "there would seem to be little process-theory justification for judicial intervention."⁴⁰¹ Judi-

395. There are, it should be added, other works that explore the relationship between public choice theory and the Takings Clause. See, e.g., Gregory S. Alexander, *Takings, Narratives and Power*, 88 Colum. L. Rev. 1752 (1988); Lunney, *supra* note 100; Marc R. Poirer, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 Rutgers L. Rev. 243 (1993); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829 (1989). The works discussed here have been selected because their insights are particularly useful in illuminating what a translated Takings Clause should be.

396. Fischel, *supra* note 390, at 890.

397. *Id.*

398. *Id.* at 911.

399. *Id.*

400. See *id.* at 886.

401. *Id.* at 910.

cial action directing compensation for decisions made by higher level governmental entities is appropriate only when there has been unfairness—as there was in *Lucas*: “[T]he fairness infirmity of the state legislation challenged in *Lucas* is the disproportionate impact on an owner in a subdivision in which all neighboring lots had been developed and were thus grandfathered by the state legislature.”⁴⁰²

Although Fischel does not claim to offer an originalist vision of any type, his concern with process failure initially appears a good translation of the original understanding. However, his account is ultimately an inadequate translation because it fails to accord enough respect to the Takings Clause’s limiting principle—the principle of deference to the political process, except where it is most prone to failure. Fischel’s theory imposes a high level of judicial scrutiny on decisions made by most localities and states. While scrutiny is less rigorous when larger governmental entities are involved, even decisions by such entities receive only a limited degree of deference, as Fischel’s suggestion that *Lucas* was correctly decided indicates.

The framers, in contrast, recognized that they were establishing a rule that did not bar the government from making incorrect decisions. For example, Madison wrote in Federalist Ten that any “improper or wicked project[s] will be less apt to pervade the whole body of the Union than a particular member of it.”⁴⁰³ By using the phrase “less apt,” Madison implicitly acknowledged that such “improper or wicked project[s]” would sometimes occur, even at the national level. Nonetheless, the Bill of Rights did not seek to combat such potential intrusions on economic interests. There were substantive constitutional protections only in cases of physical confiscation, where failure was particularly likely.

Given that the framers of the Takings Clause intended it to apply only against the national government, Fischel’s theory might nonetheless be a convincing translation if the majoritarian politics that he sees operating at the local level were completely shielded from the operations of pluralist politics. In other words, one might argue that extension of the Takings Clause to the local governments means that, because of the unique nature of local politics, such governments should be subject to a different (and higher) level of scrutiny. The weakness of this argument, however, is that our system affords those who lose local struggles an opportunity for political redress; they can challenge adverse decisions at the state level.⁴⁰⁴

402. *Id.*

403. The Federalist No. 10, *supra* note 301, at 84. For the full quotation, see *supra* text accompanying note 307.

404. As Professor Michael Schill has observed, “A black letter principle of local government law holds that local governments derive their authority from states” Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 Chi.-Kent L. Rev. 795, 838 n.196 (1991). See generally Chester J. Antieau, *Municipal Corporation Law* § 2.00 (1994) (cities creatures of states).

The recent fate of rent control in Massachusetts is illustrative. Landlords in Boston, Brookline, and Cambridge, Massachusetts were unable to get these municipalities to lift rent control. Rent control was a politically pivotal issue, and landlords were unable to enter into bargains with interest groups to secure the end of rent control. In the most recent state election, however, there was a question on the ballot directing that the rent control restrictions in Boston, Brookline, and Cambridge be lifted. It won.⁴⁰⁵ Thus, recourse to state-level political processes obviated the need for special judicial protection.⁴⁰⁶

While Fischel's theory is too broad for the translator, it is nonetheless valuable for the task of translation. It shows why special interests, although a minority, will often be able to protect themselves and therefore do not need heightened protection.

Farber's narrower theory of the Takings Clause is a more plausible translation of the original understanding.⁴⁰⁷ Farber argues that the principal purpose of the Takings Clause is "horizontal equity."⁴⁰⁸ Public choice theory shows that even in the absence of a constitutional requirement, democratic legislatures would normally compensate when they physically took property.⁴⁰⁹ Only the politically unprotected will not be compensated: "[I]n a world where government compensation is often available, it is unacceptable that some groups are denied compensation because of their unusual political vulnerability."⁴¹⁰ This principle re-

405. See The Massachusetts Rent Control Prohibition Act, Mass. Ann. Laws ch. 400 (Law. Co-op. Supp. 1995); Pamela Ferdinand, *Rent Vote Divides Landlords, Tenants*, Boston Globe, Nov. 10, 1994, at 33. After the referendum, the state legislature modified its effects by creating a safety-net for certain categories of rent control tenants; after two years, however, even the apartments of these tenants will no longer be under rent control. See An Act Providing for the Alleviation of Hardship of Certain Tenants, 1994 Mass. Adv. Legis. Serv. ch. 282 (approved Jan. 4, 1995). For news coverage, see Thomas Coakley, *Small Landlords Considering Options Under New State Law*, Boston Globe, Jan. 9, 1995, at 13.

406. In addition, because of the multitude of interests confronting a municipality, property owners can prevail, even when they are a distinct minority. The recent elections provide an illustrative example of this phenomenon. In Santa Monica, California, although renters make up 72% of the electorate and although rent control has long been firmly established in the city, an incumbent city councillor lost to a little known opponent who was opposed to rent control and ran on a law-and-order platform; concerns about public safety proved more compelling than concerns about retaining rent control. See Nancy Hill-Holtzman, *Up Against the Wall*, L.A. Times, Dec. 29, 1994 (special "Home Edition," available in LEXIS, News Library, Curnews File).

407. Farber's theory is not originalist, although he briefly invokes the history of the clause. He observes that the presence of a takings clause in the Northwest Ordinance suggests that the framers "may have been concerned about protecting non-resident investors," Farber, *supra* note 6, at 281 & n.8 (citing Treanor, *supra* note 19), but adds that analysis of the takings problem is changed by the fact that, in the modern context, the property owner is typically a resident. See *id.* at 281-82.

408. *Id.* at 308.

409. Farber's argument on why legislatures would normally compensate is discussed *supra* text accompanying notes 382-384.

410. Farber, *supra* note 6, at 206.

quires compensation whenever the government physically takes property. In order to ensure that government will not strategically evade the Takings Clause, the principle must be extended to situations in which the government seeks to transfer property from one private citizen to another. For the same reason, it must also extend to "regulations that are functionally equivalent to government acquisitions."⁴¹¹ *Lucas* falls within the last category. Because the government compensates when land is incorporated into national parks, and because the preservation ban challenged in *Lucas* was effectively the same as if his land had been seized for preservation purposes, *Lucas* should have been compensated.⁴¹²

Farber's approach parallels the original understanding in that both reflect a view of the Takings Clause as concerned with process failure and, at the same time, both recognize only a limited area in which majoritarian decisions will be overturned. Because of these parallels, Farber's theory provides a fairly good translation of the original understanding. Its weakness as translation is that its conception of process failure is too broad, for reasons suggested by Fischel's explanation of how special interests are able to use pluralist politics to protect their property claims.⁴¹³ The original interpretation of the Takings Clause (under which physical takings were compensated for) closely matched the underlying end. Farber's theory embodies a looser match, since the regulations for which he would require compensation will often not be the product of process failure. *Lucas* is a prime example of this situation.

As discussed, *Lucas* challenged the Beachfront Management Act, which prevented him from building on his property. However, he was not alone in suffering under the Act, which affected all South Carolina beachfront landowners. As Justice Stevens stated in his dissent:

The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. . . . Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, and what is equally significant, from repairing erosion control devices, such as seawalls. . . . In short, the South Carolina Act imposed substantial burdens on owners of developed and undeveloped land alike.⁴¹⁴

411. *Id.* at 304.

412. See *id.* at 304-05. The result favored by Farber thus parallels the result reached by the majority, although his rationale is different. See *id.* (criticizing majority rationale). Farber also follows Justice Kennedy's concurrence in concluding that "the common law of nuisance provides only a partial description of behavior that is considered socially harmful, and hence appropriately banned without compensation." *Id.*

413. Fischel's claim that *Lucas* was not a case of process failure has previously been noted. See *supra* text accompanying note 401. This is not a point, however, that Fischel develops in his article. See Fischel, *supra* note 390, at 910 (observing, without elaboration, that *Lucas* was not a case of process failure).

414. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2924 (1992) (Stevens, J., dissenting) (citations omitted).

Lucas was part of a large (and powerful) group affected by the legislation: beachfront property owners. This is a classic example of a group well-positioned to engage in legislative logrolling. Obviously, that group lost—but that will by definition occur when a takings claim is brought, since only losers will have grounds to complain. There is no evidence of process failure, and yet Farber would compensate Lucas. Farber would provide compensation for regulatory takings that are similar to physical takings, even though this class of regulatory takings as a whole is not one in which process failure is particularly likely.

Professor Levmore has advanced a third public choice approach to the Takings Clause, one that focuses on singling out. He argues that process failure is likely when an individual or small group of people has been singled out and that compensation is particularly appropriate in such situations. When a proposed statute or regulation affects a great many people, they can protect themselves through the political process, engaging in logrolling to ensure that they do not receive an unfair share of the public's burden. But the situation is very different when a proposed governmental action affects only a few people or, worse, a single person. Professor Levmore writes: "It is unlikely that such individuals can compete effectively in the political arena and it would be undesirable for them to try; the transaction cost of individual involvement in politics is, after all, quite great."⁴¹⁵ For example, if the government were to take my home, in the absence of a just compensation clause I would be poorly positioned to go to the legislature or Congress and obtain redress. Thus, Levmore argues that takings law properly protects individual actors and small groups of actors who are affected by governmental actions but cannot effectively engage in interest group politics because they are not repeat players and because they are a tiny part of the polity.⁴¹⁶

Again, this theory, like Farber's, is an adequate translation of original intent (although it is not offered as such),⁴¹⁷ and for the same reasons: It recognizes that the Takings Clause is concerned with process failure, and it limits the area in which majoritarian decisions involving property will be overturned. However, Levmore's theory represents an imperfect translation because it provides for compensation of a small group whose property interests are affected, even when a larger group would not be compensated. For example, a court will order compensation in the case of an individual whose property suffers a particularly sharp decrease in

415. Levmore, *supra* note 6, at 307.

416. See *id.* at 306–07; Levmore, *supra* note 154, at 1344–45; see also Farber, *supra* note 156 (public choice view of takings); Farber, *supra* note 156 (same). As previously noted, Justice Stevens's dissent in *Lucas* also embraces the notion of singling out as one factor to be considered in determining whether a taking has occurred. See *supra* text accompanying note 414.

417. Levmore explicitly does not base his theory on original intent. See Levmore, *supra* note 6, at 307. Although he also finds it normatively appealing, he offers his theory principally on the grounds that it is descriptive of current case law, and he says it is simply one of several factors considered by courts. See Levmore, *supra* note 154, at 1367.

value because of airplane overflights, but not when overflights affect a larger group.⁴¹⁸ In contrast, the original understanding did not involve making the individuals who were likely to suffer process failure better off than those protected by the political process. Rather, the Takings Clause was intended to put everyone who suffered the same injury on the same footing: Everyone whose property was physically taken received compensation.

Individually, the theories of Farber and Levmore do not accurately translate the original understanding of the Takings Clause. However, by synthesizing the two theories, one can arrive at an appropriate translation. Compensation is due when a governmental action affects only the property interests of an individual or a small group of people and when, in the absence of compensation, there would be a lack of horizontal equity (i.e., when compensation is the norm in similar circumstances). Such a theory does what the Takings Clause was initially interpreted to do; it defers to majoritarian decisionmaking in most instances but defends those most likely to be the victims of process failure.

The Supreme Court's most recent prominent takings cases can illustrate the way in which this test would operate. For reasons suggested in critiquing Farber's theory, *Lucas* would be an easy case. The challenged statute affected a large group of people that could certainly protect itself through the political process. The Court therefore should have found that there was no taking in that case.

Dolan is a closer case, but the result should have been the same. Tigard had passed a comprehensive zoning plan. When Dolan sought permission from the City Planning Commission to expand her store, the Commission conditioned its approval with standard terms previously codified in the Community Development Code and imposed on anyone who sought to expand in the Central Business District.⁴¹⁹ There was no evidence that Dolan was treated differently than anyone else. As Justice Souter noted in dissent:

The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code. This case raises no question about discriminatory, or "reverse spot" zoning, which "singles out a particular parcel for different, less favorable treatment than the neighboring ones."⁴²⁰

Thus, the ordinance uniformly affected all owners in Tigard's Central Business District. Again, this group is sizable enough to protect itself through the political process. Contrary to the Court's decision, there was no need for judicial intervention.

b. *Discrete and Insular Minorities*. — Public choice theory offers one approach to process failure. However, modern legal theory also suggests

418. See Levmore, *supra* note 6, at 315-16 (citing cases to this effect).

419. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2313-14 (1994).

420. *Id.* at 2331 n.* (Souter, J., dissenting) (citing *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978)).

that process failure is particularly likely in cases involving discrete and insular minorities. Recognition of the need for special judicial protection in view of the disadvantages faced by such groups in the political process can be traced back to footnote four of *Carolene Products*, where Justice Stone suggested that heightened scrutiny might be appropriate in "the review of statutes directed at particular religious . . . or national . . . or racial minorities."⁴²¹ Professor John Hart Ely, the leading champion of footnote four jurisprudence, has persuasively argued that because other groups are unwilling, for reasons of prejudice, to enter into political coalitions with these groups, judicial aggressiveness is appropriate and consistent with the general principle that courts should defer to majoritarian decisionmaking as long as it proceeds with due regard to those affected.⁴²²

In footnote four, Justice Stone advanced the claim that (contrary to previous Supreme Court decisions) economic rights deserve no special judicial protection, so there is a certain irony in advancing a reading of the Takings Clause that embraces footnote four. Nonetheless, the Takings Clause and the claims of discrete and insular minorities intersect in one area: environmental racism, or, as it is also called, environmental justice.⁴²³ The idea underlying the environmental racism movement is that because minority communities are not full participants in the political process, they are likely to receive more than their share of hazardous waste siting. Professor Vicki Been has recently written:

Because local protest can be costly, time-consuming, and politically damaging, siting decision makers often take the path of least resistance—choosing sites in neighborhoods that are least likely to protest effectively. Not surprisingly, many of the neighborhoods selected are populated disproportionately by the poor and by people of color. Indeed, many representatives of low income and predominantly African American, Latino, or other minority neighborhoods charge that industry and governmental siting officials have adopted a PIBBY—"put it in blacks' backyards"—strategy for siting LULUs [locally undesirable land uses].⁴²⁴

421. *United States v. Carolene Prods.*, 304 U.S. 144, 152–53 n.4 (1938) (citations omitted).

422. See John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 75–77 (1980).

423. On environmental racism, see Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 *Yale L.J.* 1383 (1994) [hereinafter *Been, Undesirable Land Uses*]; Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 *Cornell L. Rev.* 1001 (1993) [hereinafter *Been, Fairness*]; Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 *Nw. U. L. Rev.* 787 (1993).

424. *Been, Fairness*, *supra* note 423, at 1002–03; see also Lazarus, *supra* note 423, at 808 (explaining environmental racism in terms of political process failure).

Professors Regina Austin and Michael Schill have offered a number of reasons why minority communities are at a political disadvantage:

[P]oor minority communities face some fairly high barriers to effective mobilization against toxic threats, such as limited time and money; lack of access to technical, medical, or legal expertise; relatively weak influence in political or media circles; and cultural and ideological indifference or hostility to environmental issues. Limited fluency in English and fear of immigration authorities will keep some of those affected, especially Hispanics, quiescent.⁴²⁵

Although these factors suggest that process failure is particularly likely in cases involving minorities, one possible counterargument should be anticipated. The notion that discrete and insular minorities are politically disadvantaged does not command universal assent among academics. Some scholars have argued that minority interest groups in fact have disproportionate influence in the political process. Bruce Ackerman, for example, has observed: "Other things being equal, 'discreteness and insularity' will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics."⁴²⁶

Whatever the logical force of such arguments, discrete and insular minorities have not been able to reap the political benefits suggested by Ackerman. The organizational benefits of being "discrete and insular" are more than offset by the fact that, because of racial prejudice, other groups are less willing to enter into political bargains with discrete and insular minorities.⁴²⁷ Minority groups are dramatically underrepresented in legislative bodies.⁴²⁸ In addition, with respect to land use siting decisions, any organizational benefits that discrete and insular minorities might normally have are substantially (if not completely) offset by the fact that competing groups will be able to organize easily because of the high stakes and the ease of determining who is potentially affected. In other words, if two sites are under consideration for LULUs and one is in a minority neighborhood and the other is in the non-minority neighborhood, the minority neighborhood would not have any obvious organizational advantages but likely would have organizational disadvantages of the types identified by Professors Austin and Schill.

425. Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 Kan. J.L. & Pub. Pol'y, Summer 1991, at 69, 71.

426. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 723-24 (1985). For similar arguments, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 Sup. Ct. Rev. 397, 428; Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 Nw. U. L. Rev. 74 (1989).

427. See Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 685, 701-02 (1991).

428. See *id.* at 705-06.

Professor Ackerman's argument is even weaker in the environmental justice context because, as Professor Fischel has pointed out, it presupposes pluralist politics, with its opportunities for logrolling among interest groups, not majoritarian politics.⁴²⁹ As previously discussed, analyses of local government decisionmaking indicate that they are typically governed by majority rule.⁴³⁰ Thus, discrete and insular minorities face particularly significant disadvantages at the local level, while, because of racial discrimination, they are not well-positioned to secure redress at the state or national level.

The limited body of empirical work now available is consistent with these theories and indicates that minority communities bear more than their share of locally undesirable land uses. Professor Been has recently completed a preliminary study to determine whether existing data suggested that the disproportionate amount of locally undesirable land use sites in minority communities reflected the initial siting decision or the fact that, after the siting occurred and land dropped in value, minorities moved into the area. She concluded that this evidence indicated that the original siting decision disproportionately located such sites in minority communities.⁴³¹ The only previous study of this issue, conducted by Professor James T. Hamilton, reached similar conclusions.⁴³²

Thus, empirical work and legal theories about the political process and discrete and insular minorities suggest that a translation of the original understanding of the Takings Clause should encompass a second category of cases: environmental justice cases. Like individuals or small groups affected by governmental decisions, discrete and insular minorities are unusually likely to be the victims of process failure. One could conceivably argue for a translation under which all governmental actions that have a disparate impact on the property interests of discrete and insular minorities would be subject to heightened scrutiny under the Takings Clause. Decisions changing government benefits or taxing policies might then be reviewed under the clause. But that would not be a good translation. It would miss the limiting principle of the original understanding—the principle of general deference to majoritarian deci-

429. Fischel, *supra* note 381, at 893.

430. See *supra* text accompanying notes 399–400; see also Fischel, *supra* note 381, at 893 (developing this point).

431. See Been, *Undesirable Land Uses*, *supra* note 423, at 1405. Been's analysis uses and expands on data previously obtained by the United States General Accounting Office and Professor Robert Bullard. She also concludes that in the communities studied the percentage of minorities in the affected areas increased after the initial siting decision. See *id.* Such an increase did not occur, however, in the communities analyzed in the GAO report. See *id.*; Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 *Soc. Inquiry* 273 (1983).

432. See James T. Hamilton, *Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities*, 24 *Rand J. Econ.* 101, 120–22 (1993); see also Been, *Undesirable Land Uses*, *supra* note 423, at 1396–97 (discussing Professor Hamilton's study as the only previous work analyzing the "which came first" question).

sionmaking. Limitation of heightened Takings Clause scrutiny of governmental actions that affect discrete and insular minorities to environmental justice cases cabins the judiciary's ability to overturn majoritarian decisions, just as the initial limitation of the Takings Clause to cases of physical seizure meant that majoritarian decisions concerning property were subject to constraint only in a limited category of cases. Moreover, application of the Takings Clause in environmental justice cases, but not in other cases involving discrete and insular minorities, is consistent with the aim of the translation model of "making the smallest change possible in the outcome or reading to preserve the most possible from the original context."⁴³³ Environmental justice cases involve physical threats to tangible property and are thus closer in nature to physical seizures than, for example, governmental acts affecting benefits programs.

Previously, administrative siting decisions have been challenged on equal protection grounds, with a uniform lack of success.⁴³⁴ Under the approach suggested in this Article, they should be brought instead as takings claims. The possibility of process failure permits courts to be aggressive in evaluating environmental justice claims. Because the claims of minority groups are particularly unlikely to receive a fair hearing in the majoritarian process, it falls to courts to consider individual cases, weigh public need against private harm, and determine what remedy, if any, is appropriate.

The teeth in a political process-based takings analysis would lie in the fact that courts, applying such an approach, should begin by looking at whether there has been disparate impact. In contrast, under current caselaw, equal protection analysis turns on whether there has been discriminatory purpose.⁴³⁵ Disparate impact is appropriate in the takings context because the kinds of process failures at issue in environmental justice claims are not simply that overtly-bigoted decisionmakers will fail to consider fairly the claims of minority communities. Rather, the political process failures giving rise to these claims also reflect the organizational difficulties that minority communities face (as well as more subtle biases of decisionmakers).⁴³⁶ That said, an anomaly that would be created should courts adopt this approach should be acknowledged: It would mean that, in a limited subset of property cases, minority groups would receive greater protection under the Takings Clause (which was not drafted to protect them) than under the Equal Protection Clause

433. Lessig, *supra* note 10, at 1263.

434. See Lazarus, *supra* note 423, at 829-34 (discussing cases).

435. See *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977) (for equal protection violation, race must have been a motivating factor in decision and decisionmaker must have chosen course of action "because of" adverse effect on the group); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (discriminatory intent or purpose must be shown to make out an equal protection violation).

436. See text accompanying note 417 (enumerating reasons why minority communities are at a political disadvantage).

(which was). This, in turn, suggests a larger point about constitutional law. The argument set forth in this Article suggests that, at least in the takings context, concerns about protecting those who are disadvantaged in the political process have informed our constitutional system from the time of the framing and that courts have not adequately accounted for that concern. Proper regard for it would work a dramatic change in takings law. Although this point is beyond the scope of this Article, the same may be true of equal protection law: concerns about process failure, reflected in constitutional structure as a whole and the specific history of the Equal Protection Clause, may warrant use of a disparate impact test in the equal protection area as well.⁴³⁷

A modern translation of the Takings Clause must also address what standard of review courts should apply in those cases that fall within the ambit of the clause. In other words, once there has been a threshold showing that minority communities in an area are bearing a disproportionate share of locally undesirable land uses, when is a remedy appropriate? In resolving these issues, courts should apply the approach set forth in *Armstrong v. United States*⁴³⁸—an approach that Chief Justice Rehnquist,⁴³⁹ Justice Scalia,⁴⁴⁰ and Justice Stevens⁴⁴¹ have applied in takings cases.⁴⁴² Courts should read the Takings Clause “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁴⁴³ This approach puts the Court in the position that the majoritarian decisionmaker would occupy if it were not for process failure. The majoritarian decisionmaker normally balances public need against private harm. It decides whether to act against property interests and, if its actions affect property interests, whether to compensate. Under the approach proposed here, the court will have the responsibility for making these judgments in those situations in which the majoritarian decisionmaker is unlikely to consider property claims fairly.

437. See *Mobile v. Bolden*, 446 U.S. 55, 121 (1980) (Marshall, J., dissenting) (invoking Ely article in support of argument that motivational analysis is not appropriate when applied to distribution of constitutionally protected interest).

438. 364 U.S. 40 (1960) (holders of liens on boats and materials entitled to compensation when government seized boats and materials).

439. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Pennell v. San Jose*, 485 U.S. 1, 9 (1988); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 318–19 (1987).

440. See *Pennell*, 485 U.S. at 19 (Scalia, J., dissenting); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835–36 n.4 (1987).

441. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2922 (1992) (Stevens, J., dissenting); *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987).

442. On the significance of *Armstrong* in recent Supreme Court takings jurisprudence, see Frank Michelman, *Construing Old Constitutional Texts: Regulation of Use as “Taking” of Property in United States Constitutional Jurisprudence 7–16* (Sept. 9, 1994) (unpublished manuscript, on file with Columbia Law Review).

443. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Obviously, the *Armstrong* approach does not significantly constrain judicial decisionmaking—except that, in the model developed here, courts will only be able to apply the *Armstrong* approach when there has been evidence of environmental racism.⁴⁴⁴ Nonetheless, use of the *Armstrong* approach in modern cases of process failure reflects a good translation in that it directly parallels the takings approach employed by the framers. Because they feared process failure with respect to majoritarian judgments in cases involving confiscation, the framers imposed a rule that made mandatory what majoritarian decisionmakers typically did when there was no process failure: compensate. Under the modern translation, because we fear process failure in certain situations, we require courts to do what, in the absence of process failure, majoritarian decisionmakers would do: decide the matter in a way that does not reflect bias. It should be added that, apart from the fact that the *Armstrong* test affords the best approach under a translation model, given the complexity of takings issues and the range of concerns implicated, use of the *Armstrong* standard or something like it is almost inevitable when courts attempt to balance. Thus, Professor Peterson, in her exhaustive study of takings law, has concluded that while the Court has advanced a wealth of different takings tests, “the Justices evidently are deciding these cases according to their sense of when it is fair for the government to take something of economic value from a private party without paying for it.”⁴⁴⁵

c. *Education*. — The fidelity of my model to original intent depends on strict limits on the kinds of cases that are potentially occasions for judicially mandated compensation. This model does not give courts broad discretion to award compensation whenever there is political process failure. Instead, courts can award compensation only if there is political process failure in categories of cases in which such failure is most likely. As it was originally, the Takings Clause is interpreted to mandate compensation in only a limited category of cases.

At the same time, the clause, as drafted by Madison, had an educative element. Although its only literal legal effect was to require the federal government to compensate when it physically took property, the Takings Clause also stood as a statement of the principle that both the state and federal government should refrain from acting in a way that arbitrarily redistributed wealth. A translation of the original understanding should reflect this broader aim as well. Although the translated clause will empower courts to direct compensation in only a limited range of cases, it will also stand in political discourse as a statement of

444. Use of the *Armstrong* approach also does not resolve the question of whom to compensate, if a court were to decide that compensation, rather than an injunction, was the appropriate remedy. For a discussion of different ways to compensate for locally undesirable land uses, see Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 *Fordham Urb. L.J.* 787 (1994).

445. Peterson II, *supra* note 154, at 162.

principle against arbitrary redistribution. Outside of a limited category of cases, then, protection of the takings principle should be entrusted to the political process, rather than to the judicial process.

Recent political developments highlight the extent to which the political process can be a forum for the resolution of takings issues. The "property rights" movement has obtained the imposition of requirements at the state and national level that would-be regulators perform takings impact analyses.⁴⁴⁶ The movement has also sought to require compensation for regulations that do not give rise to a judicially enforceable right to compensation. In thirty-two states, bills have been introduced requiring compensation when a regulation diminishes the value of property by some specified figure (commonly fifty percent).⁴⁴⁷ Mississippi has enacted the first statute of this kind, requiring compensation for timber harvesting regulations that diminish the value of property by forty percent.⁴⁴⁸ Most significantly, the Contract with America requires that the federal government compensate any property owner whose property is diminished in value by ten percent as a result of a government regulation,⁴⁴⁹ and a range of recent proposals in Congress would, if enacted, mandate compensation when regulations affect value.⁴⁵⁰

446. See Exec. Order No. 12,630, 3 C.F.R. 554 (1988), reprinted in 5 U.S.C.A. § 601 (1995) (federal takings impact analysis required). For state legislation, see Del. Code Ann. tit. 29, § 605 (Supp. 1994); Idaho Code §§ 67-8001 to -8004 (Supp. 1994); Ind. Code Ann. § 4-22-2-32 (Burns Supp. 1994); Tenn. Code Ann. §§ 12-1-201 to -206 (Supp. 1994); Utah Code Ann. §§ 63-90-1 to -4, §§ 63-90a-1 to -4 (Supp. 1994); Wash. Rev. Code Ann. § 36.70A.370 (West Supp. 1995); W. Va. Code §§ 22-1A-1 to -6 (1994). For a discussion of such legislation, see *Recent Legislation, Property—Constitutional Law—Takings—Utah Requires Agencies and Localities to Conduct Takings Impact Analyses*, 108 Harv. L. Rev. 519 (1994).

447. See Nancy Levinson, *Give and Takings: When Do Land-Use Rules Trample Property Rights?*, *Architectural Rec.*, Oct. 1994, at 50; *Property Rights Put Heat on Regulations*, *Chi. Sun-Times*, Sept. 6, 1993, § 2, at 33.

448. See Miss. Code Ann. § 49-33-7, -9 (Supp. 1994); see also John Tibbetts, *Everybody's Taking the Fifth, Planning*, Jan. 1995, at 4, 6 (Mississippi legislation first to require compensation).

449. See *Job Creation and Wage Enhancement Act* in House Republican Conference, *Legislative Digest: Contract with America* 33, 36 (Sept. 27, 1994). For news accounts, see e.g., Christopher Georges, *Wider Property-Owner Compensation May Prove a Costly Clause in the 'Contract with America'*, *Wall St. J.*, Dec. 30, 1994, at A8; Timothy Noah & Phil Kuntz, *Gingrich Blasts Environmental Policies of Past 20 Years as 'Absurdly Expensive'*, *Wall St. J.*, Feb. 17, 1995, at A5.

450. For examples of such legislation introduced in the 104th Congress, see H.R. 790, 104th Cong., 1st Sess. (1995) (compensation when property value declines by 50% as a result of ESA or federal wetlands protection program); H.R. 925, 104th Cong., 1st Sess. (1995) (compensation when land value diminished by 10% as a result of federal agency action). For examples from the 103rd Congress, see H.R. 1330, 103rd Cong., 1st Sess. (1993) (compensation options for owners of wetlands placed into most use-restrictive category); H.R. 1388, 103rd Cong., 1st Sess. (1993) (compensation for property owner who suffers "any diminution in value" because of certain federal actions); H.R. 3875, 103rd Cong., 2nd Sess. (1993) (compensation when land value declines by 50% because of ESA or federal wetlands program). See Robert Meltz, *Where the Wild Things Are: The*

The point here is not that such statutes are needed to avoid government arbitrariness with respect to private property. That is a matter for political debate. But the point is that the statement of principle embodied in the Takings Clause—the statement that we as a people are opposed to the arbitrary redistribution of property rights—properly informs the political debate. Just as Madison invoked the clause to criticize Hamilton's economic program, so can an opponent of uncompensated wetlands regulation invoke the clause and argue that the legislation is redistributive. And just as a supporter of Hamilton's could argue that the Secretary of the Treasury's program was not arbitrary or did not involve redistribution, so could a proponent of wetlands regulation argue, for example, that the principle underlying the clause is not violated because the property owner does not have an entitlement to hurt the environment or because the price a property owner pays for wetlands reflects the possibility of future legislation. Moreover, it will also be possible to argue that other constitutional principles trump this constitutional principle in particular circumstances. But in a society that reveres the Constitution, the existence of a relevant statement of constitutional principle powerfully, and appropriately, shapes political debate. Thus, the educative function of the Takings Clause is of critical significance.⁴⁵¹

C. *Why a Translated Takings Clause Is Superior to Current Supreme Court Takings Jurisprudence on Non-Originalist Grounds*

This Article has shown why a translated Takings Clause is superior to a traditional originalist reading of the clause on both originalist and non-originalist grounds. In this Section, it shows why it is superior to the non-originalist modern Supreme Court jurisprudence on non-originalist grounds. A political process-based reading of the Takings Clause affords a more coherent reading of the text. It is consistent with dominant themes in constitutional law. It is easier to apply, and it accords appropriate deference to majoritarian decisionmakers where they are better equipped to evaluate competing claims.

1. *Modern Supreme Court Caselaw.* — Modern Supreme Court takings jurisprudence is famous for its incoherence.⁴⁵² As Professor Peterson has

Endangered Species Act and Private Property, 24 *Env'tl. L.* 369, 713 (1994) (discussing property rights movement and legislative proposals for compensation).

451. On public perceptions of the Takings Clause (and the need for further study of the topic), see William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 *Colum. L. Rev.* 1774, 1792 (1988). For discussions of the educative role of constitutional text, see *supra* note 297. For discussions of the parallel topic of the educative role of courts, see, e.g., Ralph Lerner, *The Thinking Revolutionary: Principle and Practice in the New Republic* 91–136 (1987); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 *N.Y.U. L. Rev.* 961 (1992); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 *Harv. L. Rev.* 193, 208 (1952).

452. See, e.g., Gregory S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 *Const. Commentary* 259, 259 (1992) (noting that Supreme Court has been "confused and confusing"); Farber, *supra* note 6, at 279 (describing takings law as a

observed, "[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."⁴⁵³ The Supreme Court in recent years has employed a remarkable number of tests. It held in *Loretto v. Teleprompter Manhattan CATV Corp.*⁴⁵⁴ that, where the government has physically invaded an individual's land or authorized a third party to do so, compensation is required, even if the harm suffered is trivial.⁴⁵⁵ As previously discussed, it held in *Lucas*⁴⁵⁶ that the government can regulate an activity that is a common law nuisance without providing compensation, even if such regulation strips the affected property of all value.⁴⁵⁷ At the same time, the Court also held that, if a regulation strips property of all value in cases where the activity is not a common law nuisance, then the regulation gives rise to a requirement of compensation, unless the regulation is pursuant to a background principle of state property law.⁴⁵⁸

Although these tests each have an element of manipulability, they are designed to be bright-line tests. The Court has also employed balancing tests. In some cases, it has applied the test it first advanced in *Penn Central Transportation Co. v. New York City*,⁴⁵⁹ which requires it to look at the "character of the governmental action," the extent of interference with "investment-backed expectations," and the economic impact of the governmental action on the property owner.⁴⁶⁰ In other cases, it has followed the test established in *Agins v. City of Tiburon*,⁴⁶¹ and examined whether the challenged governmental action either "substantially advance[d] legitimate state interests . . . or denie[d] an owner economically viable use of [her property]."⁴⁶² Another takings hurdle, initially imposed in *Nollan v. California Coastal Commission*⁴⁶³ and refined in *Dolan*,⁴⁶⁴ arises when the government imposes a condition concerning the use of property in return for granting a property owner permission to use her property in a previously prohibited way. In the absence of compensation, there must be an "essential nexus" between that condition and a legitimate state interest and "rough proportionality" between the harm caused by the new use of the property and the condition imposed.⁴⁶⁵

No unified theory underlies these various tests. Moreover, it is unclear when each of these tests should be applied and what each test

"mess"); Levmore, *supra* note 6, at 287 (same); Rose, *supra* note 85, at 561 (describing takings law as a "muddle").

453. Peterson I, *supra* note 154, at 1304.

454. 458 U.S. 419 (1982).

455. See *id.* (compensation owed because cable ran across apartment building).

456. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

457. See *id.* at 2900-01.

458. See *id.*

459. 438 U.S. 104 (1978).

460. *Id.* at 124.

461. 447 U.S. 255 (1980).

462. *Id.* at 260.

463. 483 U.S. 825 (1987).

464. *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

465. *Id.* at 2317, 2319.

means. For example, it is unclear when one or the other of the competing balancing tests of *Penn Central* and *Agins* is applicable—the Court has even applied both of them in the same decision⁴⁶⁶—and, with both tests, the factors identified by the Court have been interpreted in dramatically different ways in different opinions.⁴⁶⁷

2. *The Text.* — The most natural reading of the Takings Clause—“[N]or shall private property be taken for a public use, without just compensation”—is the one that the framers gave it. Compensation was required for physical seizure. Property is defined in its physical sense. The reading suggested in this Article is somewhat less obvious, but still makes sense of the text. Property is defined in terms of value. The government cannot take it for its own purposes unless it compensates. At the same time, the clause has a dual nature. In part, the prohibition is judicially enforceable: Compensation is mandated for certain types of takings. In part, the clause is hortatory. But the takings principle extends to all property.

The various tests developed by the modern Court do not, in contrast, make sense of the text. All reflect a view of property as value. None directs compensation in all cases in which value is diminished. The Court has not offered a convincing textual explanation of why only some actions diminishing the value of property give rise to a compensation requirement. For example, in *Lucas*, Justice Scalia observes that “the text of the Clause can be read to encompass regulatory as well as physical deprivations.”⁴⁶⁸ But he does not mount a textual defense for why some regulatory deprivations are takings, while others are not. Thus, from a textual viewpoint, the translation advanced here is superior to current tests; it provides a coherent way to understand the text.

3. *Consistency with Larger Themes in Constitutional Law.* — Because of its confused character, current takings law fails to reflect consistent themes. In contrast, the political process theory of the Takings Clause—with its special protection for discrete and insular minorities, general deference to majoritarian will, and concern for process failure—reflects dominant themes in modern constitutional law.

The relationship of the translation offered here to footnote four of *Carolene Products* and the constitutional jurisprudence of John Hart Ely has already been discussed.⁴⁶⁹ More broadly, the modern Court has closely scrutinized discriminatory regulations and legislation,⁴⁷⁰ while subjecting economic regulation to a low level of scrutiny.⁴⁷¹ Thus, my

466. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

467. See Peterson I, *supra* note 154, at 1316–40.

468. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 n.15 (1992).

469. See *supra* text accompanying notes 421–430.

470. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

471. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *Williamson v. Lee Optical*, 348 U.S. 483, 488–89 (1955); *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949).

approach makes interpretation of the Takings Clause consistent with broader commitments present in our constitutional structure.⁴⁷² It defers to the political process in the types of cases where our constitutional system defers to it—those cases in which the political process generally works fairly. It does not defer to the political process in the types of cases in which our constitutional system considers it suspect.

Moreover, the idea that the clause is hortatory accords with key insights of modern constitutional theorists such as Larry Sager and Cass Sunstein. Professor Sager has argued that the Constitution embodies a commitment to welfare rights, but that that commitment is judicially underenforced.⁴⁷³ In making this argument, Sager draws on a line of political and constitutional theory that begins with James Bradley Thayer and contends that judicial enforcement of constitutional rights can be counterproductive for two reasons. First, by giving them partial success, it weakens the political forces sympathetic to those rights. Second, the judicial action provokes the ire of political forces hostile to the constitutional right and thus triggers a counterreaction.⁴⁷⁴ For these reasons, Sager suggests that “judicial enforcement of economic justice [i.e., welfare rights] would . . . inappropriately congest popular political choice.”⁴⁷⁵ Judicial deference to majoritarian deliberations about the provision of economic support to the poor reflects a recognition of “the substantial virtues of ongoing popular participation in the process by which we aspire to identify and achieve the elements of a just politics.”⁴⁷⁶

Similarly, Sunstein has argued that certain constitutional rights are not wholly judicially enforceable. He has thus taken the position that “Congress, rather than the courts, should be the principal vehicle for enforcement of the Fourteenth Amendment.”⁴⁷⁷ Like Sager, Sunstein con-

472. On the importance of structure in constitutional interpretation, see generally Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 67–77, 94–98 (1969).

473. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1219–20 & n.24 (1978) [hereinafter Sager, *Fair Measure*]; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 429 (1993) [hereinafter Sager, *Justice*].

474. For Thayer's theory, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). For recent analyses of Thayer's work, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1 (1993).

475. Sager, *Justice*, *supra* note 473, at 417. For a recent empirical study that reaches similar conclusions about the limited efficacy of judicial decisionmaking to effect social change, see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 336–43, 339 (1991) (“[N]ot only does litigation steer activists to an institution that is constrained from helping them, but it also siphons off crucial resources and talent, and runs the risk of weakening political efforts.”); see also William Michael Treanor and Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 Colum. L. Rev. 1902, 1918–24 (1993) (discussing political consequences of judicial holdings of unconstitutionality).

476. Sager, *Justice*, *supra* note 473, at 417–18.

477. Cass R. Sunstein, *The Partial Constitution* 152 (1993).

tends that broad judicial enforcement of the Constitution can be counter-productive: "Reliance on the courts may impair democratic channels for seeking changes, and in two ways. It might divert energy and resources from politics, and the eventual judicial decision may foreclose a political outcome."⁴⁷⁸ Courts therefore should be aggressive in protecting constitutional rights only in two categories of cases. They need to protect "the background conditions for political deliberation," such as the right to vote, the right to speak, or "the provision of roughly equal educational opportunity."⁴⁷⁹ They also need to protect "groups or interests that are unlikely to receive a fair hearing in the legislative process."⁴⁸⁰ Thus, Sunstein's theory in this regard parallels Ely's *Carolene Products* jurisprudence.⁴⁸¹

In advancing the claim that the Constitution recognizes rights that are not judicially enforceable, Sager and Sunstein do not focus on protecting the political vitality of the takings principle.⁴⁸² Indeed, the entire current debate about the existence of judicially nonenforceable rights largely ignores property rights. And yet, if one is concerned, as Sager and Sunstein are, with the possibility that judicial aggressiveness saps the strength of political movements, there is no apparent reason why property rights should be different from other rights. Indeed, the Takings Clause may offer the paradigmatic case. Judicial aggressiveness in this realm has, after all, provided only a limited check. *Lucas* was the first case since *Pennsylvania Coal* in which the Supreme Court invalidated a regulatory taking, a passage of over seventy years.⁴⁸³ Although the final answer to the question would require detailed analysis of empirical data, it seems likely that *Pennsylvania Coal* did not ultimately prove beneficial for champions of property interests. The best evidence of this is that in England, where there is no constitutional compensation requirement, property owners have been better protected from regulations than they have been in the United States. As one commentator has observed,

[C]ompensation has been and is paid in England for regulations which would have been or are upheld as valid in the United States without payment of compensation. In other words, over the years, the statutes in England have been more

478. *Id.* at 145.

479. *Id.* at 142-43.

480. *Id.* at 143.

481. This point is instructively developed in James E. Fleming, *Constructing the Substantive Constitution*, 72 *Tex. L. Rev.* 211, 245 (1993).

482. Sager does, however, offer the Takings Clause as a possible example of an underenforced right. See Sager, *Fair Measure*, *supra* note 473, at 1219 & n.22. For Sunstein's view of the clause, see Sunstein, *supra* note 477, at 128-29 (best reading of Takings Clause comports with historical understanding of its meaning as protecting existing property holdings).

483. See Robert M. Washburn, *Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 *Md. L. Rev.* 162, 187 (1993).

generous to the property owners than have the American courts.⁴⁸⁴

If Sager and Sunstein are right that judicial victories can perversely gut the political movements they sought to advance, defenders of property interests would have been better off relying only on the political process for vindication of their claims. This would seem particularly true since their judicial victories were so few and far between. In other words, defenders of a broad conception of the takings principle would be better off joining the political "property rights" movement than placing their faith in courts.

4. *Judicial Competence and Ease and Predictability of Administration.* — The model presented here also makes sense because courts are not well equipped to engage in the kind of balancing that current caselaw requires in regulatory takings claims. In a case like *Pennsylvania Coal*, the loser in a political battle comes to court, says that a government action hurt her severely, and the court weighs the harm to her from that particular governmental act against the societal benefits from that act. What this analysis misses is that interests are repeat players in the political process. That a repeat player has lost a particular game signifies relatively little. The coal companies in *Pennsylvania Coal* may have used their clout to get anti-union legislation or lower taxes. In short, if affected parties have had a realistic opportunity to enter into political deals on a range of issues, that they lose on one piece of legislation may simply indicate that this was not a particularly salient issue for them or that other issues were more salient. Because they focus on one specific governmental act, traditional balancing tests can lead to a remedy where the loss was merely the product of political give and take.⁴⁸⁵ They give the loser an unwarranted second bite at the apple.

In addition, current takings law is unpredictable. It is unpredictable both because of the variety of tests employed and because balancing tests are unpredictable in their results. In contrast, the tests proposed here will generate largely predictable results because they create clearly defined and limited spheres in which courts will be able to order compensation.

The translation proposed here has one weakness: It involves a departure from precedent. For example, if it were adopted, not all physical takings would give rise to a judicially enforceable right to compensation.

484. Donald G. Hagman, *Compensable Regulation*, in *Windfalls for Wipeouts: Land Value Capture and Compensation* 256, 289 (Donald G. Hagman & Dean J. Misczynski eds., 1978).

485. Courts consistently act as if every political actor fully and vigorously fights every political battle. In fact, political actors invest their political capital where they think it will yield the greatest return. As stated in the text, what this means in the takings context is that parties can lose an individual battle on a regulation or statute, not because they are the victims of majoritarian processes, but because they thought it more appropriate to focus their attention elsewhere. See Treanor & Sperling, *supra* note 475, at 1917, 1937 (discussing allocation of political capital).

More generally, courts would be employing new tests that reflect an attempt to recapture the original purposes of the Takings Clause, rather than building on the way the clause has evolved. Given the general dissatisfaction with takings doctrine and the advantages offered by the translation, such a departure is justified.

In addition, despite its departure from recent precedent, the proposal advanced here is consistent with a venerable tradition in takings jurisprudence. The early, narrow readings of the state and federal takings clauses reflected a notion of deference to other actors in the political process. Courts did not deny that an injury had occurred, but nonetheless concluded that, outside the very limited area of physical takings, other actors should weigh private harm against public need and decide whether compensation was appropriate. For the Supreme Court, with respect to state governmental actions, the critical concerns necessitating deference were those of federalism. Thus, in an 1850 case in which a state had awarded clearly inadequate compensation in a just compensation proceeding, the Court acknowledged both that a wrong had been done and that it was not the Supreme Court's province to rectify that wrong: "It rests with State legislatures and State courts to protect their citizens from injustice and oppression of this description."⁴⁸⁶ Outside of the context of federalism, federal courts deferred when they believed the decision whether to compensate was political, not judicial. As Chief Justice Taney said in refusing compensation, "[I]t is a question for the decision of the political department of the government, and not for the judicial; and, consequently, is one upon which this court forbears to express an opinion."⁴⁸⁷

State courts reached similar conclusions. Thus, in *Callendar v. Marsh*,⁴⁸⁸ the Massachusetts Supreme Court observed that the just compensation clause "has ever been confined, in *judicial application*, to the case of property actually taken and appropriated by the government."⁴⁸⁹ It further stated that

[t]here are cases, without doubt, where an individual may suffer by the exercise of this [governmental] power, and thus must be made involuntarily to contribute much more than his proportion to the public convenience; but such cases seem not to be provided for, and must be left to that sense of justice which every community is supposed to be governed by.⁴⁹⁰

The court observed that the legislature could and should compensate where the harm was disproportionate, but that compensation was discretionary.⁴⁹¹

486. *Mills v. St. Clair County*, 49 U.S. (8 How.) 569, 585 (1850).

487. *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14, 445).

488. 18 Mass. (1 Pick.) 418 (1823).

489. *Id.* at 429 (emphasis added).

490. *Id.* at 431.

491. See *id.* at 433-35.

Such statements indicate that deference to majoritarian decisionmakers in part explains the limited reach of the early judicial decisions concerning takings. Courts consciously read the takings clauses narrowly because they believed that there was a sphere in which the legislature, rather than the courts, bore responsibility for balancing harm to the individual against advancing the commonweal.⁴⁹² A process-based theory of the Takings Clause appropriately restores this tradition of judicial deference to majoritarian decisionmakers in those categories of cases in which those decisionmakers can be trusted to consider property claims fairly.

CONCLUSION

As virtually every one of the legion of commentators to discuss takings law has observed, takings law today is incoherent. It lacks a unifying principle, and the Supreme Court's most recent forays into the takings realm—*Lucas* and *Dolan*—only highlight the extent to which takings law is plagued by fundamental disagreements.

This Article has proposed a revival of the principle that animated the advocates of the first takings clauses and that informed early interpretations of the Takings Clause and its state counterparts: Compensation should be mandated only in those types of cases where the political process is particularly unlikely to consider property claims fairly and, in general, the question of when the government can affect property interests should be resolved by the political process. Madison believed that the political process was most suspect when dealing with slaveowners and landowners. Others who supported either the federal Takings Clause or its predecessor clauses acted because they saw process failure in, among other things, military seizure of goods or invalidation of a regional minority's land grants.

Today, the cases in which process failure is most likely involve minority groups (as in the area of environmental racism) and the singling out of individuals or small groups of people. This Article has built on that insight to propose a modern translation of the original understanding of the Takings Clause under which courts would protect only those most vulnerable to political process failure. At the same time, it has argued that the clause was intended to serve a broad educative function and that it should inform today, as it did originally, political debate about government actions that affect property interests. This approach is easier to apply than current doctrine. It accords with original intent. It is more consistent with the text of the clause. Finally, it reflects deference to majoritarian decisionmakers where it is appropriate and a judicial check on them where it is necessary.

492. See Horwitz, *supra* note 89, at 27–31 (history of police power in nineteenth century exemplifies jurists' belief that "there could be a form of neutral legal reasoning that was fundamentally different from political reasoning").